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APPENDIX

SUPREME COURT OF THE UNITED STATES

October Term, [redacted] 1970

No. [redacted] 41

CHARLES BATCHELOR, Chief of Police,
City of Dallas, et al.

Appellants

against

BRENT STEIN,

Appellee

Appeal from the United States District Court for the Northern District of Texas

---

Filed September 8, 1969

Probable Jurisdiction Noted December 8, 1969

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. 565

CHARLES BATCHELOR, Chief of Police,
City of Dallas, et al.

Appellants

against

BRENT STEIN,

Appellee

Appeal from the United States District Court for the Northern District of Texas

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Jan. 14, 1969	Filed COMPLAINT and issued SUMMONSES (5).
Jan. 27, 1969	Filed by Henry Wade, MOTION TO DISMISS COMPLAINT.
Jan. 31, 1969	Filed by Defendants, Charles Batchelor, T. C. Snider, V. D. Monaghan and R. D. Rodgers, MOTION TO DISMISS for lack of jurisdiction, for failure to state a claim and as a matter of judicial discretion in the public interest.
Feb. 6, 1969	Filed SUPPLEMENTAL MOTION TO DISMISS by defts., Batchelor, Snider, Monaghan and Rodgers.
Feb. 11, 1969	Filed Ptlf's MOTION TO TAKE DEPOSITIONS of Officers T. C. Snides, V. D. Monaghan, & R. D. Rodgers.
Mar. 10, 1969	Filed FIRST AMENDED COMPLAINT.
Mar. 20, 1969	Filed ANSWER OF the State of Texas.
Mar. 20, 1969	Filed by State of Texas, MOTION to consider response in amicus curiae.
Apr. 1, 1969	Filed Pltf's MOTION FOR SUMMARY JUDGMENT with attached affidavit of Brent Stein.
Apr. 8, 1969	Filed ORDER designating two additional judges for 3 judge court. JRB.
Apr. 21, 1969	Filed DEPOSITIONS OF Truman C. Snider, R. D. Rodgers and Verlan Dean Monaghen.

May 12, 1969	Filed BRIEF of State of Texas and motion to dismiss.
May 28, 1969	Filed plaintiff's MOTION TO AMEND complaint.
June 9, 1969	Filed OPINION of the 3 judge court.
June 27, 1969	Filed FINAL JUDGMENT as to part of plaintiff's claims, Sec. 1 of Art. 527 of the Texas Penal Code is declared unconstitutional, definition of obscene as set forth in Sec. 3 is unconstitutional. Defendants are permanently enjoined from future enforcement of Sections 1 and 2 of Art. 527 of Texas Penal Code, Acts of 1961, 57th Legislature. All claims not herein determined are reserved for determination by a single judge of this court. (Judges ILG: STH: HOW). Copy of judgment mailed to attorneys of record.

(Filed Jan. 14, 1969)

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. CA 3-2951-B

BRENT STEIN

vs.

CHARLES BATCHELOR, Chief of Police, City of Dallas; T. C. SNIDER, V. D. MONAGHAN, R. D. RODGERS, HENRY WADE, District Attorney, Dallas County

COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

1.

This action arises under the first, fourth, fifth, sixth, ninth, and fourteenth amendments of the Constitution of the United States and under §§1983 and 1985(2) of Title 42 of the United States Code. Jurisdiction is conferred upon this court by the provisions of §1343 (3) (4) of Title 28 of the United States Code. Plaintiff by this action seeks the equitable and legal remedies provided by 28 U.S.C. §1343 and declaratory relief under 28 U.S.C. §2201.

2.

The plaintiff is Brent Stein, a resident of Dallas

County, suing on his own behalf and on behalf of a class of persons similarly situated, pursuant to Rule 23 of the Federal Rules of Civil Procedure. Brent Stein is the publisher of newspaper known as the "Dallas Notes." The class which he represents is composed of present and future employees of and contributors to the "Dallas Notes," a class too numerous to make if practicable to bring them all before the court. The claim of the Plaintiff is typical of the claim of the class and there are questions of law and fact common to the class and your plaintiff will fairly and adequately protect the interests of the class. Parties opposing the plaintiff and the class have acted on grounds generally applicable to the class thereby making final injunctive relief or declaratory relief appropriate with respect to the class as a whole.

3.

The defendants are Charles Batchelor, Chief of Police, City of Dallas, Texas, T. C. Snider, V. D. Monaghan, and R. D. Rodgers, all members of the Dallas Police Department, and Henry Wade, District Attorney of Dalla's County, all of whom are sued in their official capacities, relief is sought as to them and to their successors in office.

4.

The nature of this cause is that your plaintiff has been, is being, and will continue to to (sic) be deprived by the Dallas Police acting under color of law of rights, privileges and immunities guaranteed him by the Constitution of the United States, and specifically rights of freedom of speech, freedom of press, and freedom from unreasonable searches and seizures

as those rights are protected from invasion by the state by the 14th Amendment to the United States Constitution. Further, your plaintiff is currently being prosecuted, and fears future prosecution, by the defendant, Henry Wade, District Attorney of Dallas County, under a state statute, to wit, Article 527 of the Penal Code of the State of Texas. Prosecution under said statute deprives plaintiff of rights protected by the 1st, 4th, 5th, 6th, 9th and 14th Amendments to the United States Constitution.

5.

The "Dallas Notes" is a newspaper published twice monthly in Dallas County for general distribution to the public. It has been published, sold and distributed by your plaintiff Stein, and his predecessors for a period ofsome two years on a regular basis. The "Dallas Notes" is a member of what has come to be called the "Underground Press" and although unlike the conventional daily press, the "Dallas Notes" is nevertheless, an expression of a point of view, political and social, fully entitled to the indulgence of the constitutional protections of freedom of the press and freedom of speech. The content of the "Dallas Notes" is predominantly political containing however, other commentary on cultural and entertainment attractions. It affords a vehicle for the expression of personal opinions, predominantly from those who do not have access to the conventional media.

6.

Members of the Dallas Police have demonstrated over a period of time increasing hostility to the existence of the "Dallas Notes" and to the persons respon-

sible for its publication and distribution. This hostility has been manifested in unlawful surveillance of the location at which the "Dallas Notes" is published, and unlawful harassment of person distributing the paper.

7.

More specifically, plaintiff Stein, was illegally detained and his car searched without justifiable cause in September of 1968 by members of the Dallas Police Department who indicated they knew Stein and who conceded at the time that they had no basis for the arrest and search.

8.

Further, on October 30, 1968 your defendants, Snider and Monaghan, along with numerous other Dallas policemen, under the supervision and control of the defendant Batchelor obtained a warrant to search the premises at 3117 Live Oak in the City of Dallas, these premises included the residence of Stein and the situs for the preparation and distribution of the "Dallas Notes." This warrant was obtained and executed in violation of the Constitutional guarantees contained in the 1st, 4th, 5th, 6th, 9th, and 14th Amendments to the Constitution. (Copies of the Affidavit in support of the warrant and warrant are attached as Exhibit A.) In the execution of the warrant, the police officers seized not only alleged obscene photographs, but newspapers, a photograph enlarger, two portable typewriters, two electric typewriters, one camera, and certain amount of money, all of which related to the publication of the "Dallas Notes." The seizure of these articles had as its only purpose interference with publication of the "Dallas Notes" and was without just

or proper cause. At the time of the unlawful search and seizure of October 30th, Dallas Police arrested the plaintiff Stein, as well as other persons temporarily residing at the premises, which arrests were unlawful, and were intended to, and did have, the effect of discouraging persons from associating with, contributing to or assisting in the publication of the "Dallas Notes."

9.

Following the unlawful seizure of October 30, 1968, plaintiff Stein made arrangements to secure new equipment essential to the publication of the "Dallas Notes" and resumed publication. However, on November 15, 1968, representatives of the Dallas Police Department again obtained a search warrant to search the residence of Mr. Stein and the home of the "Dallas Notes," this warrant too was obtained and executed in violation of the guarantees of the 1st, 4th, 5th, 6th, 9th and 14th Amendments of the Constitution. (The warrant and affidavit are attached hereto as Exhibit B.)

This warrant purported to seek marijuana alleged to be on the premises. No marijuana was indeed found, however, on this occasion the Dallas Police unlawfully seized three cameras, one safety light, one lamp, one desk containing printing supplies, five card board boxes containing personal records and documents, two telephones, typewriters, and other property of the plaintiff Stein used in the publication of the "Dallas Notes." The seizure of this material was again for the sole purpose of inhibiting the publication of the "Dallas Notes" and was without justifiable cause and contravened the Constitutional rights of your plaintiff.

10.

Plaintiff has made oral and written demand for the return of the aforesaid property from the Dallas Police, but the Dallas Police continue to hold the property, which they unlawfully seized. Plaintiff has reason to believe that until injunctive relief issue requiring the return of the aforesaid property, that Dallas Police will refuse to return it to its rightful owner and further, unless restrained from future depredations of the type indicated, the Dallas Police will engage in further unlawful searches and seizures for the sole purpose of attempting to prevent the publication and distribution of the "Dallas Notes" all in violation of the Constitutional rights of the plaintiff and the class which he represents.

11.

In addition, representatives of Dallas Police unknown to plaintiff, have engaged in other unlawful acts, including interfering with contractual arrangements of the "Dallas Notes"; for the sole purpose of interfering with and impeding the publication of the "Dallas Notes."

12.

The aforesaid actions of the Dallas Police have not been undertaken in good faith but rather for the purpose of suppressing political dissent and inhibiting plaintiff and others the exercise of their Constitutional rights.

13.

The conduct on the part of the Dallas Police is part of a conspiracy having as its object prohibiting the

expression of ideas that are alien to the defendants, and having as its ultimate goal the abolition of the "Dallas Notes," all in violation of the Constitutional rights of the plaintiff and the class he represents.

14.

Plaintiff alleges that he is entitled to a preliminary injunction requiring the Dallas Police to return forwith all property seized during the unlawful raids of October 30, 1968, and November 15, 1968, and to cease any future unlawful searches and seizures with respect to plaintiff. This property is necessary to the continued publication of the "Dallas Notes" and absent prompt injunctive relief, plaintiff will suffer irreparable damage for which there is no adequate remedy at law. Plaintiff is entitled to a preliminary injunction as prayed, and upon final hearing, a permanent injunction against defendant Batchelor, and his successors, requiring them to cease and desist from the unlawful harassment of plaintiff and requiring defendant Batchelor, and his successors, to issue affirmative instructions to his subordinates to cease unlawful surveillance, unlawful arrests, unlawful searches and seizures, and other conduct directed at plaintiff and the class he represents, calculated to interfere with the publication and distribution of the "Dallas Notes."

15.

With respect to the defendant Henry Wade, the District Attorney of Dallas County, there are currently pending against the plaintiff two criminal misdemeanor cases in the County Criminal Courts of Dallas County being criminal causes 68-2549 and 68-3977C, charging plaintiff with violation of the obscenity stat-

ute of the State of Texas being Article 527 of the Texas Penal Code. In connection with these pending prosecutions your plaintiff alleges that the prosecutions are based upon property taken by unlawful search and seizure in violation of the 1st, 4th, 5th, 6th, 9th, and 14th Amendments of the Constitution, and further said statute under which the state proceeding is unconstitutional on its face, and is unconstitutional as attempted to be applied to plaintiff. Thus, plaintiff is entitled to injunctive relief against further prosecution of these criminal causes, and is entitled to further injunctive relief against any future prosecution of the plaintiff or any other persons in the class he represents under Article 527 of the Texas Penal Code.

16.

In addition, your plaintiff seeks declaratory relief under 28 U.S.C. §2201 determining the application of the provisions of Article 527 of the Texas Penal Code to the plaintiff and to "Dallas Notes," praying Court take jurisdiction of the cause and pursuant to the provisions of §2201 declare that Article 527 of the Texas Penal Code may not be constitutionally applied to the "Dallas Notes" for the reason that such application of the statute to the "Dallas Notes" would be an unconstitutional intrusion upon rights protected by the First Amendment to the Constitution, and for the further reason that Article 527 excludes from its coverage daily and weekly newspapers and thus, to uphold this exclusion and deny a similar exclusion to the "Dallas Notes," which is a bi-monthly newspaper, constitutes an arbitrary and improper classification in violation of the equal protection and due process protections of the Fourteenth Amendment of the Constitution.

WHEREFORE, premises considered, your Plaintiff respectfully prays:

(A) That this court take jurisdiction of the cause, and determine that this is a proper class action;

(B) That after notice, plaintiff be granted preliminary relief against the defendant Batchelor, and the Dallas Police Department, as described above;

(C) That upon final hearing, the Court grant the permanent injunctive relief against all defendants as described above;

(D) That the Court adjudge, decree and declare the rights of the parties with respect to the application of Article 527 of the Texas Penal Code;

(E) That the Court grant such other and further relief as is just and equitable.

Respectfully submitted,

s/ David R. Richards
1601 National Bankers Life Building
Dallas, Texas 75201

EXHIBIT A TO COMPLAINT

Complaint—Affidavit for Search Warrant for Obscene Articles and Materials.

THE STATE OF TEXAS
COUNTY OF DALLAS

(WE)

T. C. Snider and V. D. Monaghen do solemnly swear that heretofore, on or about the 30th day of October

A.D., 1968, in said County and State One Brent Stein and persons unknown to affiants at this time did then and there unlawfully possess obscecne articles and materials, to-wit: pictures, photographs, drawings and obscene literature and we have cause to believe and do believe that said obscene articles and materials are now concealed by Brett Stein and persons unknown to affiants at this time.

in a two-story brownish brick residence, trimmed in white, with a write roof, situated in Dallas County, Texas, 3117 Live Oak Street, in the City of Dallas, Texas, which said Brett Stein and persons unknown to affiants at this time occupies, possesses, controls and has charge of.

MY BELIEF AS AFORESAID IS BASED ON THE FOLLOWING FACTS:

(A) We have been informed of the existence of the foregoing set out facts by reliable, credible and trustworthy citizens of Dallas, Dallas County, Texas,

(B) and further that Brett Stein is the publisher of twice monthly newspaper, Dallas Notes of the Underground. That Brett Stein uses the name Stoney Burns in referring to himself in this newspaper. That Volume II number 15 of Dallas Notes of the Underground dated October 16-November 5, 1968, contained pictures of male persons fondling on thy breasts of female persons. That this newspaper contained obscene four (4) letter words. That this edition of this newspaper was purchased by a 13 year old girl from a peddler on the street near the Memorial Auditorium. That affiants have received information in the past 24 hours from reliable, credible and Trustworthy person that Brett Stein and persons unknown to affiants at this time are now in possession of lewd and obscene pictures, photographs, drawings and obscene literature.

WHEREFORE, (We) ask that a warrant to search for and seize the said obscene articles and material be forwith issued in accordance with the law in such cases provided.

/s/ T. C. SNIDER

/s/ V. D. MONAGHAN

Sworn to and subscribed before me by V. D. Monaghan and T. C. Snider on this the 30 day of Oct., A.D., 1968.

/s/ TOM NAYLOR
Justice of the Peace, Precinct No. -- Place -- Dallas County, Texas.

Search Warrant for Obscene Articles and Materials

THE STATE OF TEXAS
COUNTY OF DALLAS

To the Sheriff or any Peace Officer of Dallas County, Said State, GREETINGS:

WHEREAS, complaint in writing, under oath, has been made before me by T. C. Snider and V. D. Monaghen (which complaint is hereto attached and expressly made a part hereof) alleging that on or about the 30th day of October, A.D. 1968, in said County and State, one Brett Stein and persons unknown to affiants at this time did then and there unlawfully possess obscene articles and materials, to-wit: pictures, photographs, drawings and obseene literature,

and whereas, in said complaint, the said T. C. Snider and V. D. Mongahen further says that they have cause to believe and do believe that the said obscene articles and materials, to-wit: pictures, photographs, drawings and obscene literature, are now concealed by Brett Stein and persons unknown to affiants at this time in a two-story brownish brick residence, trimmed in white,

with a white roof, situated in Dallas County, Texas, at 3117 Live Oak Street, in the City of Dallas, Texas which said Brett Stein and person unknown to affiants at this time occupies, possesses, controls and has charge of.

AND said complaint having stated facts and information in my opinion sufficient to establish probable cause for the issuance of this warrant

YOU ARE THEREFORE COMMANDED TO FORWITH SEARCH THE PLACE ABOVE NAMED AND DESCRIBED WHERE SAID OBSCENE ARTICLES AND MATERIAL, TO-WIT:

are alleged to be concealed, and if you find such obscene articles and materials or any portion thereof, you will seize the same and bring it before me at my office, situated at Courthouse in the City of Dallas, in Dallas County, Texas, in said County on the 2 day of November, A.D., 1968.

AND you will also arrest and bring before me, at said place and time, the said accused of the possession of said obscene articles and materials, to-wit:

HEREIN FAIL NOT, AND DUE RETURN MAKE HEREOF TO BE AT THE TIME AND PLACE ABOVE NAMED.

WITNESS my signature on this the 30 day of October, A.D. 1968.

/s/ TOM NAYLOR
Justice of the Peace, Precinct No. 1 Place 2 Dallas County, Texas

30 October 1968
at 9:10 p.m.

OFFICER'S RETURN

Came to hand on the 30th day of October, A.D. 1968 at 9:10 o'clock P.M., and executed on the 30th day of

October, A.D. 1968 at 10:20 o'clock P.M., by seizing and taking the following described property:

A large quantity of newspapers (Dallas Notes)
1 photograph enlarger
2 portable typewriters
2 electric typewriters
1 camera
Numerous obscene photographs
$5.43 in money

Which said property was found by us at the place designated and described in the warrant and we also at the same time, arrested:
Brent LaSalle Stein, w/m/25
Robert Everett Delaney w/m/22
Patricia Lynn Bowden w/f/18
Cathy Ann McNarin w/f/18
Donna Maria Delaney w/f/22
James Franklin McDowell, Jr. w/m/21

in obedience to the comand of said warrant.

/s/ R. C. SNIDER

/s/ V. D. MONAGHAN

Returned and Filed Nov. 6 2:13 P.M. '68, Tom Naylor, Jr.

STATE OF TEXAS
COUNTY OF DALLAS

Subscribed and sworn to before me, a Notary Public in and for Dallas County, Texas, this the 1st day of November, A.D. 1968.

/s/ MARJORIE MILLER

EXHIBIT B OF COMPLAINT

SEARCH WARRANT FOR NARCOTIC DRUGS AND DANGEROUS DRUGS

STATE OF TEXAS
COUNTY OF DALLAS

To the Sheriff or Any Peace Officer of Dallas County, Texas, GREETING:

Whereas, complaint in writing under oath has been made before me by R. D. Rodgers, which complaint is hereto attached and expressly made a part hereof, alleging that on or about the 15th day of November, A.D., 1968, in the City of Dallas, Dallas County, Texas, one Brent LaSalle Stein and person unknown did then and there unlawfully possess and does at this time unlawfully possess a narcotic drug and a dangerous drug, to-wit: Marijuana and further that he has cause to believe that the said narcotic drug and dangerous drug are now concealed by Brent LaSalle Stein and persons unknown in in a house being described as a white two-story frame dwelling situated in the City of Dallas, Dallas County, Texas, located 3117 Liveoak Street which said Brent LaSalle Stein and persons unknown now possesses, occupies, controls and has charge of.

And after examining the said complaint in writing and under oath, I have determined that the said complaint does state facts and information sufficient to establish probable cause for the issuance of this warrant to search for and seize the said narcotic drug and dangerous drug in accordance with the law in such cases provided.

YOU ARE THEREFORE COMMANDED TO FORTHWITH SEARCH THE PLACE ABOVE NAMED AND DESCRIBED WHERE THE SAID NARCOTIC DRUG AND DANGEROUS DRUG, TO-WIT: Marijuana are alleged to be concealed, and if you find such narcotic drug and dangerous drug, or any portion thereof you will seize the same and bring it before me at my office, situated at _____ in the City of _____ in Dallas County, Texas, on the _____ day of _____ A.D. 19 ____.

AND, you are commanded to arrest and bring before me, at said place and time, the said: Brent LaSalle Stein and unknown persons accused of the possession of the said narcotic drug and dangerous drug.

HEREIN FAIL NOT, AND DUE RETURN MAKE HEREOF TO ME AT THE TIME AND PLACE ABOVE NAMED.

Witness my signature on this the 15th day of November, A.D. 1968; at 7:30 o'clock p.m.

/s/ W. E. RUBBING
MAGISTRATE

Justice of the Peace, Precinct No. 2, Place 1, Dallas County, Texas

OFFICER'S RETURN

Came to hand on the 15th day of November, A.D. 1968, at 7:30 o'clock P.M. and executed on the 15th day of November, A.D. 1968, at 9:30 o'clock P.M., by seizing and taking the following described property:

SEE ATTACHED LIST

which said property was found by (us) at the place designated and described in the warrant, and (we) also, at the same time, arrested:

Brent LaSalle Stein W/M/25
Charlotte Alice Barker W/F/18
Carol Marie Cundiff W/F/19
Carol Ann Brandon W/F/19
Steven Keith Clevenger W/F/19
all for Inv. Possession Obscene Material

in obedience to the command of said warrant.

/s/ R. D. Rodgers

STATE OF TEXAS
COUNTY OF DALLAS

Subscribed and sworn to before me, a Notary Public in and for Dallas County, Texas, this the 20th day of November, A.D. 1968.

/s/ Kenneth P. Wolford

Returned 11-20-68
B.D.

ITEMS CONFISCATED AT 3117 LIVE OAK STREET: ALL ITEMS USED IN CONNECTION WITH THE PRINTING OF PORNOGRAPHIC MATERIAL, TO WIT: "DALLAS NOTES." EVIDENCE PLACED IN POLICE PROPERTY ROOM, 1505 CANTON STREET.

Property room Tag #39-631:

One (1) Polaroid land camera, Swinger Model 20.
One (1) Kodak Brownie Fiesta R4 Camera
One (1) Flocon FR camera
One (1) Kodak Adjustable "Safety-light" Lamp Model "A"

Property room Tag #39-633:	One (1) Brown "Davor Floating Fixture" lamp (U.S. Government written on the base)
Property room Tag #39-633	One (1) Brown formica, 3 drawer desk, containing printer's supplies.
Property room Tag #39-634	One (1) T Square (drafting square) One (1) 24" X 36" drafting table (wooden) Two (2) wooden drawing boards One (1) Mailing tube confaining printer's paper.
Property room Tag #39-635	Five (5) cardboard boxes containing personal records, documents, newspapers, and printing supplies, also numerous additions of the newspaper "Dallas Notes." Two (2) black Bell System Telephone One (1) Swingline stapler
Property room Tag #39-636	One (1) IBM Executive Model Typewriter (electric), Serial #199431. One (1) Typewriter desk stand (wooden).

/s/ R. D. Rodgers

STATE OF TEXAS
COUNTY OF DALLAS

Subscribed and sworn to before me, a Notary Public in and for Dallas County, Texas, this the 20th day of November, A.D. 1968.

/s/ KENNETH P. WOLFORD

Complaint—Affidavit for Search Warrant for Narcotic Drugs and Dangerous Drugs

THE STATE OF TEXAS
COUNTY OF DALLAS

I, R. D. Rodgers, do solemnly swear that heretofore, on or about the 15th day of November, A.D. 1968, in the City of Dallas, Dallas County, Texas, one Brent LaSalle Stein and persons unknown did then and there unlawfully possess and does at this time unlawfully possess a narcotic drug and a dangerous drug, to-wit: Marijuana in House being described as a white two-story frame dwelling located 3117 Liveoak Street in City of Dallas, Dallas County, Texas, which said house is possessed, occupied, under the control and charge of Brent LaSalle Stein and persons unknown.

MY BELIEF OF THE AFORESAID STATEMENT IS BASED ON THE FOLLOWING FACTS:

I have been informed of the foregoing setouts facts by a person, who I know to be reliable, credible and trustworthy, who states the following facts: I, the affiant, have on this date, received information from a confidential source who states the house located at 3117 Liveoak Street which is occupied by Brent LaSalle Stein was visited in the past twenty-four hours and Marijuana was observed being smoked. The informant further states that there is still a quantity of marijuana in the house, and that it is kept in a Folgers coffee can located in the attic to the right of the ladder leading from the upstairs hall closet to the attic. This investigation has included surveilences and resulted in officers observing several known and several reported narcotic users. I, the affiant do personally know this house located at 3117 Liveoak Street is occupied by Brent LaSalle Stein, I, the affiant have received information from this confidential source on numerous occasions in the past and it has always been true and correct.

Wherefore, I ask that a warrant to search for and seize the said narcotic drug and dangerous drug at the above described premises be issued in accordance with the law in such cases provided.

/s/ R. D. RODGERS

Sworn to and subscribed before me by ----------, on this the 15th day of November, A.D. 1968.

7:30 p.m.

/s/ W. E. RUBBING
MAGISTRATE

Justice of the Peace, Precinct 7,
Place 1 Dallas County, Texas

(Filed Jan. 27, 1969)

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

AT DALLAS

CIVIL ACTION NO. CA 3-2951-B

BRENT STEIN

Plaintiff

vs.

CHARLES BATCHELOR, Chief of Police, et al., and HENRY WADE, Criminal District Attorney, Dallas County

Defendant

MOTION TO DISMISS COMPLAINT

Henry Wade, Criminal District Attorney of Dallas County, Texas, moves to dismiss the complaint herein on each and all of the grounds that:

1. Plaintiff has failed to allege facts in the complaint upon which relief under the Civil Rights Act can be granted against Henry Wade, Criminal District Attorney.

Defendant Henry Wade, as Criminal District Attorney of Dallas County is immune from liability under the Civil Rights Act, and Plaintiff has failed to allege facts sufficiently to show abandonment of his quais-judicial role as a basis for liability.

2. The complaint herein fails to set forth a substantial claim of the "unconstitutionality" of Article 527 of the Texas Penal Code, or of its application. Since such complaint does not assert a substantial federal question, Plaintiff has not applied for a three-judge District Court under the provisions of 28 U.S.C. Sections 2281 and 2284 to hear and determine the alleged claim that Article 527 of the Texas Penal Code is unconstitutional.

3. Plaintiff requests that this Federal Court strike down and enjoin the enforcement of Article 527 of the Texas Penal Code, including the pending two criminal cases filed in the state courts of Texas. 28 U.S.C.A. Section 2283 prohibits such interference with pending state criminal cases. Furthermore, it is clear that the prohibition under Section 2283 against enjoining state court proceedings cannot be avoided by seeking a declaratory judgment.

WHEREFORE, the complaint herein should be dismissed.

WILSON JOHNSTON
/s/ JAMES M. WILLIAMSON
Assistant District Attorneys
of Dallas County, Texas

ATTORNEYS FOR HENRY WADE, CRIMINAL DISTRICT ATTORNEY, DALLAS COUNTY, TEXAS

Address: 7th Floor, New Courthouse
Dallas, Texas
75202

CERTIFICATE OF MAILING

I hereby certify that on the 27th day of January, 1969, I sent to Honorable David R. Richards, Attorney for Plaintiff, 1601 National Bankers Life Building, Dallas, Texas 75201, a true copy of the foregoing Motion to Dismiss, by mail, postage pre-paid.

/s/ JAMES M. WILLIAMSON

(Filed Jan. 30, 1969)

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. CA 3-2951-B

BRENT STEIN

vs.

CHARLES BATCHELOR, Chief of Police, City of Dallas; T. C. SNIDER, V. D. MONAGHAN; R. D. RODGERS, and HENRY WADE, District Attorney, Dallas County

MOTION TO DISMISS

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, CHARLES BATCHELOR, Chief of Police, City of Dallas; T. C. SNIDER; V. D. MONAGHAN and R. D. RODGERS, Defendants in the above numbered and styled cause, and files this their Motion to Dismiss upon the following grounds:

1.

Defendants move the Court to dismiss the Complaint of Plaintiffs for the reason that the Court lacks jurisdiction to afford the relief sought therein by Plaintiffs because of Title 28, USC, Section 2283, which provides as follows:

"A court of the United States may not grant an injunction to stay proceedings in a State Court

except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction or to protect or effectuate its judgments."

The Complaint of the Plaintiffs does not allege that there is any exception to 28 U. S. Code Annotated, 2283. The Plaintiffs, by bringing this action against certain Police officers and the District Attorney, seeking the injunctive relief prayed for therein, cannot circumvent the above cited Anti-Injunction Statute of the United States. It is further submitted that Plaintiff has complete relief within the framework of the State courts and that there is no reason for this Court to accept jurisdiction of this cause. There is no allegation or claim of diversity or citizenship or that matters complained of have been decided by the highest court of the State, or that Plaintiff has not adequate relief or remedy in the State Courts. It is, to the contrary, clear from the pleadings of Plaintiff, that the two State Court actions, being Causes No. 68-2549 and 68-3977-C, were pending in the County Criminal Court of Dallas County, Texas, at the time of the filing of Plaintiff's Complaint, and that the said cases are still pending at this time; the said Cause No. 68-3977-C having been filed with the County Clerk of Dallas County on November 1, 1968, and Cause No. 68-2549 having been filed with the County Clerk of Dallas County on November 26, 1968.

2.

The Defendants say further that the Complaint filed herein by Plaintiff should be dismissed for the reason that the same fails to state a claim against Defendants upon which relief can be granted. Defendants say that the Complaint contains allegations that are nothing

more than bare generalities and does not meet the standards necessary to state a claim or cause of action as provided by law. Defendants say further that the relief sought hereby is so vague, general and speculative that it cannot be made the basis of a judgment.

3.

Defendants say further that in the event that the Court overrules their Motion as to jurisdiction and failure to state a claim, that the Court should use its judicial discretion as a basis for refusing to invoke its equity jurisdiction in this matter. It is submitted that under the circumstances of this case, the Court would be jusified in using its discretion in the avoidance of a multiplicity of suits in that there is a clear and adequate remedy at law in the State courts in which suits have already been filed for Plaintiff's claims to be heard and adjudicated. It is submitted that there is no showing of irreparable injury that would compel this Court to impose its jurisdiction upon the State courts or showing that the State courts would not give any and all of Plaintiff's Complaints fair and proper consideration under the laws of the State of Texas and of the United States.

WHEREFORE, PREMISES CONSIDERED, the Defendants, CHARLES BATCHELOR, Chief of Police, City of Dallas, T. C. SNIDER, V. D. MONAGHANS and R. D. RODGERS, pray that Plaintiff's Complaint be dismissed for lack of jurisdiction under 28 U. S. Code Annotated 2283, which forbids injunctions to stay proceedings in a State court except as expressly authorized by Act of Congress; that Plaintiff's Complaint be dismissed for the further reason

that it fails to state a claim or cause of action upon which relief can be granted; and in addition thereto, the case should be dismissed as a matter of judicial discretion in the public interest.

Respectfully submitted,

N. ALEX BICKLEY
City Attorney
City of Dallas, Texas

THOMAS B. THORPE
Assistant City Attorney

/s/ THOMAS B. THORPE
Office of the City Attorney

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(Certificate of Service Omitted)

(Filed Feb. 6, 1969)

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. CA 3-2951-B

BRENT STEIN

vs.

CHARLES BATCHELOR, Chief of Police, City of Dallas; T. C. SNIDER, V. D. MONAGHAN R. D. RODGERS and HENRY WADE, District Attorney, Dallas County

SUPPLEMENTAL MOTION TO DISMISS

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, CHARLES BATCHELOR, Chief of Police, City of Dallas; T. C. SNIDER; V. D. MONAGHAN; and R. D. RODGERS, Defendants in the above numbered and styled cause, and files this their Supplemental Motion to Dismiss upon the following grounds:

1.

That an agreement between Plaintiff and the above Defendants has been reached in regard to certain personal property previously held in custody by the Dallas Police Department, and all of such property has been returned to Plaintiff under the terms of an Indemnity and Release Agreement (said release of claims exclud-

ing injunctive relief) signed by Plaintiff on January 30, 1969, and supplemented by an additional Exhibit and Return of Property on February 5, 1969. The only property retained by the Police Department of the City of Dallas consists of film negatives, eight or ten photographs, one movie advertisement poster, one litho copy of paper, and a representative number of back issues of paper entitled "Dallas Notes" or "Notes from the Underground." The retained property relates directly to the two cases charging Defendant with possession of obscene materials presently pending in the County Criminal Courts of Dallas County, Texas, and identified as Cause No. 68-3977-C and Cause No. 68-2549. As provided for in Texas Code of Criminal Procedure rules pertaining to pre-trial discovery, Plaintiff's attorney has been voluntarily permitted to examine and inventory said retained property. The retained property has no effect upon Plaintiff's publishing or distributing his paper identified as "Dallas Notes."

It is furthermore stated by Defendants herein that there is no "unlawful" surveillance or harassment being conducted or contemplated against Plaintiff, and there is no "unlawful" arrest or "unlawful" search and seizure contemplated or intended by Defendants. The Defendants do say that they are charged with the responsibility of enforcing the Criminal laws of the State of Texas, and Ordinances of the City of Dallas, and will do so as it relates to this Plaintiff as well as any other person.

2.

The above and foregoing is submitted to the Court as further basis for the Court to exercise its judicial discretion by refusing to invoke its equity jurisdiction

in this matter and refusing the injunctive relief sought by Plaintiff as it relates to the above named Defendants. There would be no resulting irreparable injury to Plaintiff by this action of the Court, and would simply leave Plaintiff to existing remedies available in the State Court, and would be an exercise of discretion to avoid a multiplicity of suits. (See Paragraph 3 of Motion to Dismiss and Paragraph III of Memorandum Brief in Support Thereof filed herein by Defendants).

WHEREFORE, PREMISES CONSIDERED, the Defendants, Charles Batchelor, Chief of Police, City of Dallas, T. C. Snider, V. D. Monaghan, and R. D. Rodgers, re-assert their prayer for relief as contained in their Original Motion to Dismiss filed herein on January 30, 1969.

Respectfully submitted,
N. ALEX BICKLEY
City Attorney
City of Dallas, Texas

THOMAS B. THORPE
Assistant City Attorney

/s/ THOMAS B. THORPE
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Attorneys for Defendants,
Charles Batchelor, Chief of
Police, T. C. Snider,
V. D. Monaghan, and
R. D. Rodgers

(Certificate of Service Omitted)

(Filed March 10, 1969)

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. CA 3-2951-B

BRENT STEIN

vs.

CHARLES BATCHELOR, Chief of Police, City of Dallas; T. C. SNIDER, V. D. MONAGHAN, R. D. RODGERS, and HENRY WADE, District Attorney, Dallas County

FIRST AMENDED COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

1.

This action arises under the first, fourth, fifth, sixth, ninth, and fourteenth amendments of the Constitution of the United States and under Secs. 1983 and 1985(2) of Title 42 of the United States Code. Jurisdiction is conferred upon this court by the provisions of Sec. 1343(3)(4) of Title 28 of the United States Code. Plaintiff by this action seeks the equitable and legal remedies provided by 28 U.S.C. Sec. 1343 and declaratory relief under 28 U.S.C. Sec. 2201.

2.

The plaintiff is Brent Stein, a resident of Dallas County, suing on his own behalf and on behalf of a

class of persons similarly situated, pursuant to Rule 23 of the Federal Rules of Civil Procedure. Brent Stein is the publisher of newspaper known as the "Dallas Notes." The class which he represents is composed of present and future employees of and contributors to the "Dallas Notes," and persons engaged in the distribution of the "Dallas Notes," a class too numerous to make it practicable to bring them all before the court. The claim of the plaintiff is typical of the claims of the class and there are questions of law and fact common to the class and your plaintiff will fairly and adequately protect the interests of the class. Parties opposing the plaintiff and the class have acted on grounds generally applicable to the class thereby making final injunctive relief or declaratory relief appropriate with respect to the class as a whole.

3.

The defendants are Charles Batchelor, Chief of Police, City of Dallas, Texas, T. C. Snider, V. D. Monaghan, and R. D. Rodgers, all members of the Dallas Police Department, and Henry Wade, District Attorney of Dallas County, all of whom are sued in their official capacities, relief is sought as to them and to their successors in office.

4.

The nature of this cause is that your plaintiff and the class he represents has been, is being, and will continue to be deprived by the Dallas Police, acting under color of law, of rights, privileges and immunities guaranteed by the Constitution of the United States, and specifically rights of freedom of speech, freedom of press, and freedom from unreasonable

searches and seizures as those rights are protected from invasion by the state by the 14th Amendment to the United States Constitution. Further, your plaintiff is currently being prosecuted, and fears future prosecution, by the defendant, Henry Wade, District Attorney of Dallas County, under a state statute, to-wit, Article 527 of the Penal Code of the State of Texas. Prosecution under said statute deprives plaintiff of rights protected by the 1st, 4th, 5th, 6th, 9th and 14th Amendments to the United States Constitution.

5.

The "Dallas Notes" is a newspaper published twice monthly in Dallas County for general distribution to the public. It has been published, sold and distributed by your plaintiff, Stein, and his predecessors, and the class he represents, continuously for a two year period. The "Dallas Notes" is a member of what is known as the "Underground Press." Although it differs from the conventional daily press, the "Dallas Notes" constitutes a legitimate expression of a point of view, political and social, fully entitled to all indulgences of the constitutional protections of freedom of the press and freedom of speech.

6.

Members of the Dallas Police under the supervision of defendant Batchelor have demonstrated increasing hostility to the existence of the "Dallas Notes" and to the persons responsible for its publication and distribution. This hostility has been manifested in unlawful surveillance of the location at which the "Dallas Notes" is published, and unlawful harassment by arrest and threat of arrest of persons engaged in the publication and distribution of the "Dallas Notes" paper.

7.

More specifically, plaintiff Stein, was illegally arrested and detained and his car searched without just or proper cause in November, 1968, by members of the Dallas Police Department, who indicated they knew Stein and who conceded at the time that they had no basis for the arrest and search.

8.

Further, on October 30, 1968, your defendants, Snider and Monaghan, along with numerous other Dallas policemen, under the supervision and control of the defendant Batchelor, obtained a warrant to search the premises at 3117 Live Oak in the City of Dallas, these premises included the residence of Stein and the situs for the preparation and distribution of the "Dallas Notes." This warrant was obtained and executed in violation of the Constitutional guarantees contained in the 1st, 4th, 5th, 6th, 9th, and 14th Amendments to the Constitution. Among other infirmities the warrant was issued without probable cause, was a general warrant, and authorized the indiscriminate seizure of written materials by the police without a prior judicial determination of their obscenity, and permitted a prior restraint of speech. (Copies of the Affidavit in support of the warrant and warrant are attached as Exhibit A.) In the execution of the warrant, the police officers seized not only alleged obscene photographs, but thousands of newspapers and books, private papers, a photograph enlarger, two portable typewriters, two electric typewriters, one camera, and certain amount of money, all of which related to the publication of the "Dallas Notes." The seizure of these articles had as its only

purpose interference with publication of the "Dallas Notes," and was without just or proper cause. At the time of the unlawful search and seizure of October 30th, Dallas Police arrested the plaintiff Stein, as well as other persons found at the premises, which arrests were unlawful, and were intended to, and did have, the effect of discouraging persons from associating with, contributing to or assisting in the publication of the "Dallas Notes."

9.

Following the unlawful arrest and seizure of October 30, 1968, plaintiff Stein made arrangements to secure new equipment essential to the publication of the "Dallas Notes" and resumed publication. On November 15, 1968, representatives of the Dallas Police Department again obtained a warrant to search the residence of Mr. Stein and the home of the "Dallas Notes," this warrant too was obtained and executed in violation of the guarantees of the 1st, 4th, 5th, 6th, 9th and 14th Amendments of the Constitution. (The warrant and affidavit are attached hereto as Exhibit B.) This warrant purported to authorize seizure of marijuana alleged to be on the premises. No marijuana was present, nevertheless, the Dallas Police unlawfully seized three cameras, one safety light, one lamp, one desk containing printing supplies, five cardboard boxes containing personal records and documents, two telephones, typewriters, and other property of the plaintiff Stein used in the publication of the "Dallas Notes," and other miscellaneous property of the plaintiff. The seizure of this material was again for the sole purpose of inhibiting the publication of the "Dallas Notes," was without justifiable cause and abridged the Constitutional rights of your plaintiff.

10.

Oral and written demand was made upon the Dallas Police Department for return of the confiscated material. These requests were refused and/or ignored until filing of the present suit. Although the material has now been returned, plaintiff asserts that unless restrained from future depredations of this type, the Dallas Police will engage in further unlawful searches and seizures for the purpose of preventing the publication and distribution of the "Dallas Notes," all in violation of the Constitutional rights of the plaintiff and the class which he represents.

11.

In addition, representatives of Dallas Police unknown to plaintiff, have engaged in other unlawful acts, including interfering with contractual arrangements of the "Dallas Notes," and threatening persons selling the "Dallas Notes" with arrest for the sole purpose of interfering with and impeding the publication of the "Dallas Notes," all in violation of the Constitutional rights of the plaintiff and the class he represents.

12.

The aforesaid actions of the Dallas Police have not been undertaken in good faith but rather for the purpose of suppressing political dissent and inhibiting plaintiff and others in the exercise of their Constitutional rights of freedom of speech and press.

13.

The conduct on the part of the Dallas Police is part of a conspiracy having as its object prohibiting the ex-

pression of ideas, and having as its ultimate goal the suppression of the "Dallas Notes," all in violation of the Constitutional rights of the plaintiff and the class he represents.

14.

With respect to the defendant Henry Wade, the District Attorney of Dallas County, there are currently pending against the plaintiff two criminal misdemeanor cases in the County Criminal Courts of Dallas County, being criminal causes 68-2549 and 68-3977C, charging plaintiff with possession of obscene "paper" and "pictures" in violation of the obscenity statute of the State of Texas, being Article 527 of the Texas Penal Code. These prosecutions are based in part upon plaintiff's possession of copies of the "Dallas Notes" alleged to be obscene. In connection with these pending prosecutions your plaintiff alleges that the prosecutions are based in their entirety upon property taken by unlawful search and seizure in violation of the 1st, 4th, 5th, 6th, 9th and 14th Amendments of the Constitution, and further said statute under which the state proceeding is unconstitutional on its face, and is unconstitutional as attempted to be applied to plaintiff.

16.

Your plaintiff seeks declaratory relief under 28 U.S.C. Sec. 2201 determining the application of the provisions of Article 527 of the Texas Penal Code to the plaintiff and to "Dallas Notes," praying Court take jurisdiction of the cause and pursuant to the provisions of Sec. 2201 declare that Article 527 of the Texas Penal Code is unconstitutional on its face and as applied to the "Dallas Notes," for the reasons that

such application of the statute to the "Dallas Notes" "invades the area of protected freedoms." Without limiting his contentions, plaintiff asserts that the statute suffers from unconstitutional overbreadth, in that it seeks to punish for mere possession of obscene material, and the statute is devoid of any language that requires a finding that the material have no redeeming social value. Finally, the statute violates rights of equal protection and due process as it arbitrarily exempts from its reach "daily and weekly newspapers," and yet leaves open to prosecution bi-monthly newspapers, such as the "Dallas Notes."

17.

In support of prayer for declaratory relief, plaintiff asserts that he wishes to continue publication and distribution of the "Dallas Notes" with content of a nature similar to that which has exposed him to arrest and prosecution in the past. Plaintiff fears future arrests and prosecution under Article 527 unless his rights thereunder are declared by this Court.

WHEREFORE, premises considered, your plaintiff respectfully prays:

(A) That this court take jurisdiction of the cause, and determine that this is a proper class action;

(B) That upon final hearing, the Court grant the permanent injunctive relief against the Dallas Police Department, requiring that (1) there be no arrest of plaintiff, nor seizure of his property on grounds of obscenity without a prior judicial determination of the obscene character of the material in question; (2) that affirmative instructions be issued throughout the Dallas

Police Department advising of the constitutional standards governing arrest without warrant, search and seizure, and the rights of freedom of speech and press;

(C) That the Court adjudge, decree and declare the rights of the parties with respect to the application of Article 527 of the Texas Penal Code;

(D) That the Court grant such other and further relief as is just and equitable.

Respectfully submitted,

DAVID R. RICHARDS
1601 National Bankers Life Building
Dallas, Texas 75201

(Exhibits A and B to the foregoing complaint are identical to the exhibits to the original complaint and are omitted.)

(Filed March 20, 1969)

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. CA 3-2951-B

BRENT STEIN

VS.

CHARLES BATCHELOR, Chief of Police, City of Dallas; T. C. SNIDER, V. D. MONAGHAN, R. D. RODGERS, and HENRY WADE, District Attorney, Dallas County

RESPONSE BY THE STATE OF TEXAS

Now comes the State of Texas acting by and through its duly elected Attorney General, Crawford C. Martin and by way of amicus curiae would respectfully address the Court in regard to the above numbered and styled cause.

I.

STATEMENT OF THE CASE

The Attorney General of the State of Texas received a copy of Plaintiff's First Amended Complaint on March 13, 1969, from the Honorable Henry Wade, District Attorney of Dallas County, Texas. (Earlier a copy of the original Complaint had been received from counsel for Plaintiff.)

At issue here is Article 527 of the Texas Penal Code, the statute providing

Art. 527. 509 Acts involving obscene articles, objects and materials; fines and penalties; exemptions

Section 1. Whoever shall knowingly photograph, act in, pose for, model for, print, sell, offer for sale, give away, exhibit, televise, publish, or offer to publish, or have in his possession or under his control, or otherwise distribute, make, display, or exhibit any obscene book, magazine, story, pamphlet, paper, writing, card, advertisement, circular, print, pictures, photograph, motion picture film, image, cast, slide, figure, instrument, statue, drawing, phonograph record, mechanical recording, or presentation, or other article which is obscene, shall be fined not more than One Thousand Dollars ($1,000) nor imprisoned more than one (1) year in the county jail or both.

Sec. 2. Whoever shall knowingly offer for sale, sell, give away, exhibit, televise, or otherwise distribute, make, display, or exhibit any obscene book, magazine, story, pamphlet, paper, writing, card, advertisement, circular, print, pictures, photograph, motion picture film, image, cast, slide, figure, instrument, statue, drawing, phonograph record, mechanical recording, or presentation, or other article which is obscene, to a minor shall be fined not more than Two Thousand, Five Hundred Dollars ($2,500) nor imprisoned in the county jail more than two (2) years or both.

Sec. 3. For purposes of this article the word "obscene" is defined as whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests. Provided, further, for the purpose of this article, the term "contemporary community standards" shall in no case involve a territory or geographic area less than the State of Texas.

Sec. 4. Whoever shall be convicted for the second time of a violation of this article shall be deemed guilty of a felony and shall be punished by confinement in the State penitentiary for not more than five (5) years or by a fine of not more than Ten Thousand Dollars ($10,000) or by both such fine and imprisonment.

Sec. 5. It shall be a defense to any charges brought hereunder if such prohibited matter or act shall be regularly in use in any bona fide religious, education or scientific institution or the subject of a bona fide scientific investigation.

The provisions of this Act shall not apply to any motion pictures produced or manufactured as commercial motion pictures which (1) have the seal under the Production Code of the Motion Picture Association of America, Inc., or (2) legally move in interstate commerce under Federal Laws or (3) are legally imported from foreign countries into the United States and have been passed by a Customs Office of the United States Government at any port of entry.

The provisions of this Act shall not apply to any daily or weekly newspaper.

Sec. 6. The district courts of this State and the judges thereof shall have full power, authority, and jurisdiction, upon application by any district or county attorney within their respective jurisdiction, to issue any and all proper restraining orders, temporary and permanent injunctions, and any other writs and processes appropriate to carry out and enforce the provisions of this Act.

THE NECESSITY OF CONVENING A THREE-JUDGE COURT TO GRANT THE RELIEF PRAYED FOR IN THE FIRST AMENDED COMPLAINT

It is apparent that, in substance, the First Amended Complaint alleges that Article 527, Texas Penal Code, is unconstitutional and that accordingly, an injunction should be issued to restrain the peace officers and prosecutors of Dallas County, Texas, from attempting to enforce the provisions of this statute, a statute having statewide application.

While the Complaint calls for declaratory relief under Section 2201, Title 28, U.S.C., no relief can thereby be afforded Plaintiff unless Article 527 is held to be unconstitutional and injunctive restraint of the law enforcement officials is ordered.

This relief cannot be afforded except through an application of the provisions of Sections 2281 through 2284, Title 28, U.S.C. *Moody v. Flowers*, 387 U.S. 97 (1967), 87 S.Ct. 97. See also *Cameron v. Johnson*, 390 U.S. 611 (1968), 88 S.Ct. 1335, rehearing den. 391 U.S. 971, 88 S.Ct. 2029.

This Court's initial inquiry should therefore be the propriety of requesting the convening of a three-judge court.

THE GOVERNOR AND THE ATTORNEY GENERAL OF TEXAS SHOULD BE GIVEN PROPER NOTICE OF THE PENDENCY OF THE CASE.

As observed above, Plaintiffs are seeking to restrain the enforcement of a law of Texas which defines obscenity and provides penalties for violations of the terms of the law. As also noted the relief prayed for would require action by a three-judge federal court.

Subsection 2 of Section 2284, Title 28, United States Code provides in part as follows:

"(2). If the action involves the enforcement, operation or execution of State statutes or State administrative orders, at least five days notice of the hearing shall be given to the governor and attorney general of the State.

. . . .

"Such notice shall be given by registered mail or by certified mail by the clerk and shall be complete on the mailing thereof."

The State of Texas, through its Attorney General, states that no notice as provided for by the above statute has been received.

Since the inquiry herein must of necessity revolve around the propriety of forming a three-judge court, the proper notice should be given.

Although this response is in the nature of amicus curiae, the State of Texas is also a real party in interest inasmuch as its laws are attacked as being violative of the Constitution of the United States. And while the Governor and Attorney General of the State of Texas now have actual notice of this suit, it is felt that the provisions of subsection (2) of Section 2284 should be enforced according to their terms so as to forcefully bring to the attention of all parties, seeking to enjoin the enforcement of state statutes, the fact that the federal courts will require that the proper notice be given. This requirement will serve to prevent other suits in other parts of the State of Texas, attacking this and other statutes, from being filed without complying with the proper notice requirements. It is conceivable that such suit could be filed and lead to the issuance of an injunction against the enforcement of state statutes of statewide application without the crit-

state officials warning of the suit and having the opportunity to defend the constitutionality of the statute attacked.

The United States Court of Appeals for the Fifth Circuit in *Jackson v. Choate*, decided on November 23, 1966, incorporated as an appendix a memorandum of the Honorable John R. Brown, Chief Judge of the Court. In this memorandum Judge Brown expresses the opinion that a three-judge court should be formed in order to determine the propriety of convening the three-judge court in the interest of conserving judicial time.

However, the State of Texas questions the correctness of Judge Brown's conclusions and would point to *Hall v. New York*, 359 F.2d 26 (2nd Cir., 1966), cert. denied 385 U.S. 879 (1966), wherein the Court held that a district court had no jurisdiction to entertain an application for a three-judge court where the five (5) day notice of hearing was not given to the governor and the attorney general of the state as required by 28 U.S.C., Section 2284 (2). This case accordingly stands for the proposition that the question of whether a three-judge court should be convened should be left to the district court where the complaint is filed where the requested relief, an injunction against the enforcement of a state statute, requires three-judge court action.

However, in any event, whether *Jackson v. Choate* or *Hall v. New York* be deemed to be the correct statement of the law regarding the convening of a three-judge court, a three-judge court is required here if state officials are to be enjoined from enforcing the terms of Article 527, and notice should be given to the

governor and the attorney general as to the pendency of this action.

ARTICLE 527, THE TEXAS OBSCENITY STATUTE IS CONSTITUTIONAL, THERE BEING NO SUBSTANTIAL FEDERAL QUESTION RAISED BY THE PLEADINGS.

The critical issue in this case, whether considered by an individual federal judge or by a three-judge court, is whether or not the Plaintiffs' claim of unconstitutionality directed at Article 527 raises a substantial federal question.

The criteria in measuring substantiality in a federal question should be either that it is obviously without merit or that the question has been foreclosed by prior decisions of the United States Supreme Court. *California Water Service v. Redding*, 304 U.S. 252 (1938); *Gircin v. Board of Elections*, 380 F.2d 445 (2nd Cir. 1967), cert. denied, 389 U.S. 1048 (1968).

Accordingly, it has been held that where the state statute in question has been determined to be constitutional by the Supreme Court of the United States, a three-judge court is not required. *Klein v. Lee*, 254 F.2d 188 (7 Cir. 1958), vacated 358 U.S. 645 (1959), rehearing den. 359 U.S. 962 (1959); *Moss v. Hornig*, 314 F.2d 89 (2 Cir. 1963).

And while it is not completely clear, the obscenity statute of Texas has been inferentially held to be constitutional by the Supreme Court. The Court of Criminal Appeals of Texas upheld the constitutionality of Article 527 in *Pfeiffer v. State*, 396 S.W.2d 396 (1965). The United States Supreme Court denied certiorari, 382 U.S. 943 (1965). Justice Black and Douglas dis-

senting. The Supreme Court also refused to grant certiorari in *Ford v. Miami*, —— U.S. ——, 88 S.Ct. 231 (1967), to review a Florida statute containing the same definition of obscenity as that in the Texas statute. Justices Stewart, Black and Douglas, who are at least consistent in opposing all convictions under obscenity statutes, dissented in the *Ford* case and pointed out that the petitioner was convicted under a statute that did no comport with Justice Brennan's expansion of the *Roth* test in *Memoirs v. Massachusetts*, supra. It is noted that neither Justice Brennan nor the other five members of the Court who declined to vote for review thought this raised a constitutional question of sufficient weight to merit certiorari. Admittedly, the foregoing authority is not clear, but what there is supports the constitutionaliy of Article 527.

On the issue of whether the federal question is without merit, the Plaintiff's attack on the constitutionality of the statute must be considered. Plaintiff's contention here that Article 527 is unconstitutional may be fairly summarized as follows: (1) Article 527 does not include in its definition of obscenity that the material must be utterly without redeeming social value. (2) Article 527 is unconstitutionally overbroad in that it seeks to punish for mere possession of obscene materials. (3) That it offends equal protection because it exempts from its reach "daily and weekly newspapers" and yet permits prosecution based on the contents of "bi-monthly newspapers" and (4) Article 527 is unconstitutional because it contains no provision for judicial determination of obscenity before seizure.

The Definition Of Obscenity In Article 527 Is Constitutionally Sound And Sanctioned.

Initially, Plaintiffs say that the Texas statute is unconstitutional because its definition of obscenity does not meet the standards as set forth by *Memoirs v. Massachusetts*, 383 U.S. 413 (1966) in that it does not include a requirement that the alleged obscene item be "utterly without redeeming social value." In answering this contention, it should be pointed out that the definition of "obscene" in Article 527 was taken verbatim from *Roth v. United States*, 354 U.S. 476 (1957). There have been decisions since *Roth* which "elaborated" on its definition of obscenity, for example, *Memoirs v. Massachusetts*, supra, 383 U.S. at 418, but they most assuredly did not overrule it.

Indeed, the opinion in *Memoirs* points out that the question, which was before the state courts in that case, was whether or not the subject book satisfied the test of obscenity "*established in Roth v. United States.*" (Emphasis added; page 418 of the opinion.)

Moreover, in *Jacobellis v. Ohio*, 378 U.S. 184 (1964), Justice Brennan said at page 191:

> "Recognizing that the test for obscenity (in Roth) is not perfect, we think any substitute would raise equally difficult problems, and we therefore adhere to that standard."

In a dissenting opinion in *Jacobellis*, Chief Justice Warren, joined by Justice Clark, said, (378 U.S. at 200):

> "For all the sound and fury that the Roth test has generated, it has not been proven unsound, and I believe that we should try to live with it—at least until a more satisfactory definition is evolved. . . ."

Accordingly, the contention that Article 527 is un-

constitutional because it makes no reference to the "no redeeming social value" of *Memoirs*, has no merit. The test of obscenity expressed in *Roth* is still the law and the Texas definition of obscenity was taken directly from *Roth*. While the trial courts of Texas may have to formulate a charge to the jury in terms of the "no redeeming social value" injunction of *Memoirs*, the statute itself does not fall because it does not contain this language.

The Possibility That Article 527 Prohibits The Mere Possession Of Obscene Materials Does Not Render The Statute Unconstitutional.

Observation should first be made that no Texas decision has held that the mere possession of obscenity is a violation of Article 527. On the contrary, the Court of Criminal Appeals in *Ex parte Phelper*, 433 S.W.2d 897, decided on December 4, 1968, expressly refused to consider this question. This Court should not attempt to interpret the Texas statute as Plaintiffs suggest until there is a direct holding by the highest court of Texas on the possession question or until there is a prosecution for mere possession.

It should further be noted that the Supreme Court of the United States has never held that prosecution for nothing more than possession of obscene materials or articles is an unconstitutional abridgement of due process standards.

It should finally be submitted that even if the courts of Texas later hold that mere possession of obscenity is punishable under Article 527, the entire statute should not be struck down as being in violation of the United States Constitution.

No Unfairness Exists In Article 527 Because It Assertedly Denies Equal Protection.

Plaintiff's complaint with regard to the denial of equal protection is directed at the exemption in Article 527 which excludes daily and weekly newspapers from the operation of the statute. This exemption can mean that publishers and vendors of magazines and publications which are denominated newspapers, but which are published less frequently than weekly, can be punished under the terms of the statute while daily and weekly newspapers are not punishable.

It should first be observed that the legal publication, *Words and Phrases*, defines a newspaper as a publication printed and distributed at regular intervals, usually daily or weekly, and containing news, opinions, advertisements and other matters of public interest.

Article 28a, Vernon's Civil Statutes, defines a newspaper as follows:

> "(2) The term 'newspaper' shall mean any newspaper devoting not less than twenty-five (25) per cent of its total column lineage to the carrying of items of general interest, published not less frequently than once each week. . . ."

It is submitted that the exclusion of newspapers which is contained in Article 527, that the statute "shall not apply to any daily or weekly newspapers," follows the general definition of what a newspaper has come to mean.

The legislature is entitled to take notice and cognizance, in the passage of criminal statutes, that obscenity is more likely to be purveyed by means of magazines and books and is less likely to be a part of daily and

weekly newspapers. In other words, obscenity is not ordinarily spawned by what the public has come to accept as a "newspaper" but rather has its birth and inception in books and magazines.

The State of Texas submits that this is a reasonable classification which the legislature can make in the enactment of its penal statutes, and the state further observes that all people that do not fit within the weekly or daily newspaper exemption are treated alike and equally. See *Ford v. Attorney General of Pennsylvania*, 184 F. Supp. 129, affirmed 364 U.S. 291.

This same legislative judgment, that obscenity is a greater problem in publications that are not either daily or weekly newspapers, carries over into the exemption on films which move in interstate or foreign commerce or which have the seal under the production code of the Motion Picture Association of America. Past experience has indicated that obscenity more often rears its head in motion pictures displayed in penny arcade emporiums than in the movie houses of this and other states. (At least this was true at the time Article 527 was passed.) Again, the judgment of the legislature in determining the more critical sources of obscenity should not be judicially second-guessed.

In summary, the Legislature of Texas has set up classes within which obscenity was (and perhaps is) the greater problem. Within the classes as drawn, all members are treated equally and alike. No violation of equal protection is shown or demonstrated.

The Lack Of An Intrinsic Judicial Procedure For Making A Determination As To Obscenity Prior To Or After Seizure Does Not Render Article 527 Unconstitutional.

Plaintiffs additionally contend that there should be some procedure set out in the Texas obscenity statute so that there can be a prior judicial determination made on the question of whether materials to be seized are obscene. This contention is lacking in efficacy.

Observation is made that, while Article 527 contains no provision for a prior judicial determination on whether or not any materials are obscene prior to seizure or prosecution, this fact alone does not render the statute unconstitutional. It may be that in an obscenity prosecution, the peace officers of Texas will have to obtain the article alleged to be obscene in some fashion other than by seizure pursuant to an arrest or pursuant to a search warrant. Then, in the trial on the merits there can be a judicial determination as to whether the article is, in fact and law, obscene.

But, it is again reiterated that the mere absence of a provision for a prior judicial hearing on the question of obscenity prior to seizure should not mean that Article 527 is unconstitutional in its entirety.

What the Supreme Court has indicated in its decisions is that *procedures* for seizing alleged obscenity are constitutionally bad without some preliminary, adversary, judicial hearing and determination on the question.

In *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964) the Supreme Court condemned the seizure proceedings which were exercised to enforce the Kansas obscenity statute. The court said at page 210 of the opinion,

> "It is our view that since the warrant here authorized the sheriff to seize all copies of the speci-

dled titles, and since P-K was not afforded a hearing on the question of the obscenity *vel non* of the seven novels before the warrant issued, *the procedure was, likewise, constitutionally deficient.*" (Emphasis added)

Again at pages 210 and 211 the court stated:

> "We therefore conclude that in not first according P-K an adversary hearing, *the procedure leading to the seizure order was constitutionally deficient.*" (emphasis added)

The court concluded at page 213 as follows:

> ". . . if seizure of books precedes an adversary determination of their obscenity, there is danger of abridgment of the right of the public in a free society to unobstructed circulation of non-obscene books. . . . Here, as in Marcus, 'since a violation of the Fourteenth Amendment infected the proceedings, in order to vindicate appellants' constitutional rights' 367 U.S., at 738, the judgment resting on a finding of obscenity must be reversed."

It seems clear that what the Supreme Court was condemning in *A Quantity of Books v. Kansas*, was the procedure used to obtain the alleged obscenity materials. The Kansas statute defining obscenity and punishing it was not declared to be unconstitutional.

Accordingly, it is submitted that the absence of the provision of an adversary proceeding to determine obscenity prior to seizure should not invalidate Article 527 in its entirety. The peace officers of Texas can purchase materials and objects they feel to be obscene from whoever may possess them and the prosecution may be instituted on the basis of the purchased articles. This procedure would in no way offend the injunction of and rule announced by *A Quantity of Books v. Kansas*.

CONCLUSION

It should again be made clear that the interest of the State of Texas as amicus centers around the constitutional attack on Article 527, the state believing the statute is constitutional on its face. This amicus is unaware of what exactly the evidence will reveal upon a hearing of this cause. However, regardless of the *procedures* used in the attempted enforcement of Article 527, in this particular situation amicus submits that the statute is valid and should not be held to be unconstitutional.

WHEREFORE, premises considered, Amicus prays that the contentions made herein, as to the propriety of convening a three-judge court, as to the necessity of proper notice, and as to the constitutionality of Article 527, be given consideration by the Court and that upon final hearing, Article 527 be declared to be constitutional.

Respectfully submitted.

CRAWFORD C. MARTIN
Attorney General of Texas

HAWTHORNE PHILLIPS
Executive Assistant

ROBERT G. FLOWERS
Assistant Attorney General

LONNY F. ZWEINER
Assistant Attorney General

Attorneys for the State of Texas
Box "R" Capitol Station
Austin, Texas 78711

(Certificate of Service omitted.)

(Filed Mar. 20, 1969)

IN THE

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

C.A. NO. 3-2951

BRENT STEIN

vs.

CHARLES BATCHELOR, Chief of Police, City of Dallas; T. C. SNIDER, V. D. MONAGHAN, R. D. RODGERS, and HENRY WADE, District Attorney, Dallas County

MOTION TO CONSIDER RESPONSE IN AMICUS CURIAE

TO THE HONORABLE JUDGES OF SAID COURT:

Now comes the State of Texas and moves this Court to consider the attached Response by the State of Texas submitted as amicus curiae in reaching a determination on the issues presented by the Complaint herein. The reasons for this type of submission are set out in the Response.

WHEREFORE, premises considered, the State of Texas prays that the attached response be filed with the papers of this cause and be considered by this Court in reaching its decision in this cause.

Respectfully submitted,

CRAWFORD C. MARTIN
Attorney General of Texas

HAWTHORNE PHILLIPS
Executive Assistant

ROBERT C. FLOWERS
Assistant Attorney General

LONNY F. ZWIENER
Assistant Attorney General

Attorneys for the State of Texas
Box "R" Capitol Station
Austin, Texas 78711

(Filed Apr. 1, 1969)

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. CA 3-2951-B

BRENT STEIN

vs.

CHARLES BATCHELOR, Chief of Police, City of Dallas; T. C. SNIDER, V. D. MONAGHAN, R. D. RODGERS, and HENRY WADE, District Attorney, Dallas County

MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the plaintiff and pursuant to the provisions of Rule 56 of the Federal Rules of Civil Procedure moves for partial summary judgment declaring Article 527 of the Penal Code of the State of Texas unconstitutional and in support thereof would show:

1.

Plaintiff seeks declaratory judgment establishing that Article 527 of the Penal Code of the State of Texas is unconstitutional. There is no genuine issue as to any material fact with respect to this aspect of the cause, and plaintiff is entitled to summary judgment as a matter of law declaring Article 527 unconstitutional.

2.

Plaintiff in making this motion for summary judgment relies upon the depositions of defendant police officers Snider, Monaghan, and Rodgers, and pleadings and the attached affidavit of plaintiff Brent Stein.

3.

WHEREFORE, PREMISES considered, your plaintiff respectfully prays that summary judgment be granted, declaring Article 527 of the Penal Code of the State of Texas unconstitutional.

Respectfully submitted,

DAVID R. RICHARDS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 1st day of April, 1969, caused a copy of the foregoing Motion for Summary Judgment to be served to the following individuals by depositing same in the U.S. Mail, postage prepaid:

Mr. Tom Thorpe
Assistant City Attorney
Office of City Attorney
City Hall
Dallas, Texas

Mr. Henry Wade
District Attorney
County Courthouse
Dallas, Texas

Mr. Wilson Johnston
Office of the District Attorney
Dallas County Courthouse
Dallas, Texas

DAVID R. RICHARDS

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. CA 3-2951-B

BRENT STEIN

vs.

CHARLES BATCHELOR, Chief of Police, City of Dallas; T. C. SNIDER, V. D. MONAGHAN, R. D. RODGERS, and HENRY WADE, District Attorney, Dallas County

AFFIDAVIT

In support of the Motion for Summary Judgment herein, the undersigned affiant makes this affidavit and thereby on oath states the following:

1.

I am over twenty-one years of age, am of sound mind, and have personal knowledge of every statement made herein, and am fully competent to testify the matters stated herein:

2.

I am the editor and publisher of the newspaper known as the "Dallas Notes," and have been in such capacity for a period of time in excess of six months. During the time that I have been in this capacity, the "Dallas Notes" has been published regularly twice monthly and distributed generally throughout Dallas County. It is distributed both by mail and direct sales through newsstand and individual salesmen. Its price

is twenty cents per issue in Dallas and thirty cents outside Dallas.

3.

The present circulation of the "Dallas Notes" is approximately 2500 copies per issue, both by sales and subscriptions. The content of the "Dallas Notes" is similar to most newspapers, as it contains intelligence of current events and news of general interest, and commentary upon entertainment. Attached to incorporate it with this affidavit is the most recent issue of the "Dallas Notes" of March 5, 1969 which is typical of the issues of the papers during the time I had been editor, both as to size and content.

4.

As a consequence of a search and seizure by the Dallas police on October 30, 1968, I am presently being prosecuted by Henry Wade, criminal District Attorney of Dallas County, Texas, for alleged unlawful possession of "obscene pictures" in cause number 68-3977-C pending in the County Criminal Court Number 3 of Dallas County, Texas. As a consequence of a search and seizure carried out by the Dallas police on or about November 15, 1968, I am currently being prosecuted by Henry Wade, criminal District Attorney of Dallas County, Texas, for alleged unlawful possession of "obscene paper" in cause number 68-2549 pending in the County Criminal Court of Dallas County, Texas. I am informed by my attorney that in both of these prosecutions the State relies upon as a portion of their evidence issues of the "Dallas Notes."

It is my present intention to continue publication of the "Dallas Notes" in Dallas County, Texas and to continue to distribute it throughout Dallas area. It is further my intention and desire to continue to include in the newspaper material similar to that contained in the previous issues of the "Dallas Notes" which have been characterized by the Dallas police, the District Attorney's office as constituting obscenity in violation of Article 527 of the Penal Code of the State of Texas.

BRENT STEIN

SUBSCRIBED AND SWORN TO, before me, this 1st day of April, 1969.

A. E. PENELL
Notary Public in and for County of Dallas, Texas

EXCERPTS FROM THE DEPOSITION OF TRUMAN C. SNIDER

(The Deposition is not bound with the Record in this case but appears as a separately bound volume. Page notations below are to the Deposition volume)

[At page 4]

By Mr. Richards

Q Give us your full name, sir.

A Truman C. Snider.

Q How are you employed, Mr. Snider?

A Dallas Police Department in the Vice Control Division.

Q And you rank?

A Lieutenant.

Q You are the same Lieutenant Defendant in this suit brought by Mr. Stein?

A Yes Sir.

* * *

[At page 10]

* * *

Q All right. In connection with the return of October 30, 1968, I take it that the decision to seek the search warrant was made by you and Sergeant Monaghan, is that correct?

A Yes, sir. Well, really it was me.

Q It was you?

A Yes, sir.

Q If you can recall, did you discuss your determination to seek the warrant with any superior officer within the department?

A Well, Director Frazier and I had discussed this prior to this.

Q You did discuss it?

A Yes.

Q What did you discuss?

A We discussed the situation out there.

[At page 11]

Q By situation, do you mean the existence of Dallas Notes?

A The pornography and the newspaper in general.

* * *

[At page 12]

* * *

Q In your discussion with Director Frazier, did you reach any policy or any determination as to steps or actions to be taken?

A Yes, he instructed me to take a copy of the Notes to the District Attorney's Office and check with them to see if they would accept the case against this particular issue of the paper.

* * *

[At page 15]

* * *

A I don't know the exact words but the gist of the whole thing was I wanted to know if he would accept a case on this obscene newspaper and he said he didn't see why not. It looks obscene to me—this sort of thing.

Q Did you discuss specific portions of the newspaper?

A Yes. He wanted to look at the whole thing, all of it.

Q Did you direct his attention to any specific portions as obscene?

A Not particularly.

Q Do you know whether Mr. Steinson read it all or just glanced at it?

A He did not read it all.

* * *

[At page 21]

* * *

Q The affidavit and the search warrant were typed and you and Sergeant Monaghan took the affidavit and the search warrant to the hockey game?

A Yes sir.

Q And had Judge Naylor paged?

A Yes, sir.

Q And presented to him the affidavit, is that correct?

A Yes sir.

Q And was the game in progress when you arrived?

A Yes, sir. He came to the door and went with us to a table in the lobby and he authorized it.

Q How much time did you spend with Judge Naylor on that occasion? Do you recall—a minute or two?

A Ten to fifteen minutes, I'm sure.

Q What did you give him in addition to this affidavit, Exhibit Number 1, anything other than that?

A No, sir.

Q You did not present him with a copy of the paper?

A No sir.

* * *

[At page 25]

* * *

Q In fairness then, this was a call from someone unknown to you on the telephone who asserted the facts that you set out in your affidavit about the sale of a newspaper?

A Yes.

Q Did you make any investigation as to the accuracy of the facts before completing the affidavit and presenting it to Judge Naylor?

A The newspaper was picked up at this person's residence by one of our officers but I don't remember who. The newspaper and the note with the name of the person complaining was attached to this copy of the Notes.

* * *

[At page 31]

* * *

Q After having obtained the warrant, where next did you go?

A I think we went directly to 3117 Live Oak Street. We got there—it wasn't much after 9:10. I'd say around 10:00 o'clock when we got there. I am not real sure, but we didn't come back down town. I believe we went directly to Live Oak from the Fair grounds.

* * *

[At page 32]

* * *

Q Who, in addition to these gentlemen, went along on the raid?

A We had a photographer from the Crime Lab. We had two trucks—had several trusties; I don't remember how many.

* * *

[At page 3_]

* * *

[At page 35]

* * *

Q Describe for us generally the premises, physically what is there.

A Well, the house sits on a corner of Skiles and

[At page 36]

Live Oak. it is a two-story house with four—I believe five bedrooms. Downstairs on the left you go through a living room with a fire place. From there you go into the dining room and from there into the kitchen. That is all on the left side.

On the right is a bedroom in the front and another behind it is where I guess the office was—in the back bedroom on the right.

Q The office of what?

A Of the Notes.

Q On the first floor of the house?

A The lower floor.

* * *

[At page 38]

* * *

[At page 39]

* * *

Q What instructions did you give the officers in effecting this search and seizure as to what they

[At page 40]

were to do?

A They were to search for any obscene material they could find. All of our officers know what obscene material is.

Q What is obscene material?

A Well, I wish you hadn't ask that. I take that back. They don't know, neither do I.

Q What instructions had you given them in terms of what they were to do?

A To search for obscene material and seize it.

Q What definition, if any, did you give them as to obscene material?

A I didn't.

* * *

[At page 41]

Q What is your best estimate of the number of newspapers seized on that occasion?

A We guessed two tons.

* * *

[At page 42]

* * *

Q There were newspapers seized that were not the Dallas Notes, too, were there not?

A Yes, sir.

* * *

[At page 46]

* * *

Q You feel that Article 527 does authorize you as a police officer to make on the spot determinations as to the obscenity of given material and to confiscate that material you deem to be obscene, is that correct?

A Yes.

* * *

[At page 47]

* * *

Q On that occasion you seized a photograph enlarger, is that correct?

A Yes, sir.

Q On what basis did you seize and confiscate the photograph enlarger?

A It is my contention that the pictures are obscene and it was used to help put these pictures in the newspapers. It is an implement of the crime.

Q And the same for the camera?

A Yes, sir.

* * *

[At page 51]

* * *

Q Did you make any judgment that evening as to

[At page 52]

whom to arrest or did you arrest everyone there?

A We arrested everyone there.

* * *

[At page 55]

* * *

Q You have indicated that you have read with some care Plaintiff's exhibit number 2 which is the issue of the Notes from the Underground in question. Did you read the portion dealing with the fact that Larry Caroline had been fired by the University of Texas?

A Yes, sir.

Q Did you consider that portion obscene?

[At page 56]

A Not particularly.

Q What about the portion of the paper dealing with police harrassment of an establishment called the Family Circle, did you read that portion of the paper?

A Yes, sir.

Q Did you consider it obscene?

A The article, as a whole?

Q Yes.

A No.

* * *

Q What about the portion "SDS Calls for Student Strike"?

A No, sir.

* * * *

[At page 60]

Q By the way, were you aware at the time you obtained the search warrant and made your search that the pictures that appeared in the Dallas Notes—Plaintiff's exhibit number 2—were publicity stills advertising a movie?

A Other than what I gathered from reading the newspaper, no.

* * *

[At page 62]

* * *

Q (By Mr. Richards) Okay. Would it surprise you and did you know that the movie, "Office Party," from which apparently some of these pictures were taken—"Scarlet Negligee," and "Hot Blooded Woman" were shown and advertised in the Dallas Morning News and shown in the Dallas theaters?

A I am now.

* * *

[At page 74]

Q Are you aware of any communication with Southwestern Bell Telephone?

A After the November 15 raid, yes.

* * *

Q What communication?

A They were notified that we have the telephone in our possession and they could come and pick it up?

* * *

[At page 78]

* * *

Q What do you know about the raid of November 15? Did you participate in it?

A No, sir.

Q Did you authorize it?

A Yes, sir.

* * *

[At page 81]

* * *

Q Did it surprise you when he came back with desks and telephones?

A No sir.

Q That was consistent with your instructions to him?

A When they got in there, I was at home and they called me and told me what they found and I instructed them to get the newspapers and typewriters and all materials used to publish the newspaper.

* * *

[At page 82]

* * *

Q But Sergeant Vaughn sought your instructions and your instructions were to seize exactly everything they seized, is that correct?

A Yes sir.

Q And they cleaned house again?

A Yes, sir.

* * *

PORTION OF DEPOSITION OF VERLAN DEAN MONAGHEN

(The Deposition is not bound with the Record in the case but appears as a separately bound volume. Page Notations below are to the Deposition volume.)

* * *

[At page 3]

* * *

Q Give us your full name, please.

A Burland Dean Monaghen.

Q You are a Sergeant, is that correct?

A Yes, sir.

Q In the Morals Section?

A No, sir. I am in the General Enforcement Section.

* * *

[At page 12]

* * *

Q And called Lieutenant Snider at home?

A Yes, sir.

Q What did you tell him?

A I told him we had been unsuccessful in finding the marijuana at the location. I told him I had run into another issue of the Notes and pornographic pictures there.

Q Did you ask him for instructions and advice?

A Yes, sir.

Q What did he advise you?

A He advised me to confiscate the pornographic literature and any equipment used to make it up.

* * *

[At page 14]

Q Actually one of them was a picture of Mao Tse-Tung?

A What is he? Some kind of a Communist?

Q I guess. If I pronounced it correctly, he is the Premier of China. Did you seize a poster of Mao Tse-Tung?

A I sure did.

Q Did you seize that poster because it was

[At page 15]

pornographic?

A No sir.

Q Why, because it offended you?

A I don't know.

Q Did you seize it because it offended you?

A I didn't know what to seize and what not to seize so I just took everything.

Q There was nothing about the poster that appealed to your prurient interest?

A No, sir.

Q I am curious, frankly. Apparently, there were arrested five people in the raid of 15 November. Does that refresh your memory, looking at the return of the warrant?

A Yes, sir.

Q On what basis were they arrested?

A Well, we didn't know—actually, what we had there and that is the reason I advised them to place them all under arrest. They were all part of producing the paper until investigations could be made.

Q It was their association with the production of the paper that caused them to be arrested?

A That is correct.

• • •

(Filed April 8, 1969)

IN THE

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

CIVIL ACTION NO. 3-2951

BRENT STEIN

vs.

CHARLES BATCHELOR, Chief of Police, City of Dallas; T. C. SNIDER, V. D. MONAGHAN, R. D. RODGERS, and HENRY WADE, District Attorney, Dallas County

(1) Requesting Judge: Honorable SARAH T. HUGHES, Northern District of Texas

(2) District Judge: Honorable HALBERT O. WOODWARD, Northern District of Texas

(3) Circuit Judge: Honorable IRVING L. GOLDBERG

(4) Date of Order: April 3, 1969

The Requesting Judge (1) above named to whom an application for relief has been presented in the above cause having notified me that the action is one required by Act of Congress to be heard and determined by a District Court of three Judges, I, John R. Brown, Chief Judge of the Fifth Circuit, hereby designate the Circuit Judge (3) and District Judge (2) named above

to serve with the Requesting Judge (4) as members of, and with him to constitute the said Court to hear and determine the action.

This designation and composition of the three Judge court is not a prejudgment, express or implied, as to whether this is properly a case for a three Judge rather than a one Judge court. This is a matter best determined by the three Judge Court as this enables a simultaneous appeal to the Court of Appeals and to the Supreme Court without the delay, awkwardness, and administrative insufficiency of a proceeding by way of mandamus from either the Court of Appeals, the Supreme Court, or both, directed against the Chief Judge of the Circuit, the presiding District Judge, or both. The parties will be afforded the opportunity to brief and argue all such questions before the three Judge panel either preliminary or on the trial of the merits, or otherwise, as that Court thinks appropriate. See Jackson v. Choate, 5 Cir., 1968, 404 F.2d 910, [Misc. No. 1071, Nov. 29, 1968], Jackson v. Department of Public Welfare of the State of Florida, S.D. Fla., 1968, F. Supp. ; Smith v. Ladner, S.D. Miss., 1966, 260 F. Supp. 918.

John R. Brown
Chief Judge
Fifth Circuit

(Filed May 28, 1969)

IN THE

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

CIVIL ACTION NO. 3-2951

BRENT STEIN

Plaintiff

vs.

CHARLES BATCHELOR, Chief of Police, City of Dallas; T. C. SNIDER, V. D. MONAGHAN, R. D. RODGERS, and HENRY WADE, District Attorney, Dallas County

Defendants

MOTION TO AMEND

Comes now Plaintiff and moves the Court that he be permitted to amend his pleadings, and that his pleadings be amended, to include in his prayer for relief the following:

> (1) That the Court issue a permanent injunction against the Defendants, their agents, employees and those acting in concert with them, permanently restraining and enjoining them from arresting, presenting for indictment, prosecuting (with the exception of presently pending causes) or otherwise proceeding against the named Plaintiff and the class he represents under Article 527 of the Penal Code of the State of Texas.

(2) A declaratory judgment issue declaring Article 527 to be unconstitutional on its face and as it may be applied to Plaintiff.

In support of its request Plaintiff would show that no prejudice results to any party as a result of the Amendment, and that to allow the amendment would serve the ends of justice. In this connection all parties were advised by letter of April 8, 1969, that Plaintiff intended to seek such an amendment. By permitting the amendment, we thereby eliminate any jurisdictional issue as to the propriety of a three-judge court. For the inclusion of the injunction prayer clearly requires a three-judge court under 28 U.S.C. 2281.

WHEREFORE premises considered Plaintiff respectfully prays that he be granted leave to amend and that his pleadings be deemed amended as aforesaid.

Respectfully submitted,

DAVID R. RICHARDS
205 Texas AFL-CIO Bldg.
308 West 11th Street
Austin, Texas 78701

Attorney for Plaintiff

(Filed June 9, 1969)

IN THE

UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

CIVIL ACTION NO. CA 3-2951-B

BRENT STEIN

Plaintiff

vs.

CHARLES BATCHELOR, Chief of Police, City of Dallas; T. C. SNIDER, V. D. MONAGHAN, R. D. RODGERS, and HENRY WADE, District Attorney, Dallas County

Defendants

Before GOLDBERG, Circuit Judge, HUGHES and WOODWARD, District Judges.

HUGHES:

This case involves the constitutionality of Article 527 of the Texas Penal Code, entitled "Acts involving obscene articles, objects, and materials; fines and penalties; exemptions.'" It is a civil rights case brought

---

'Section 1. Whoever shall knowingly photograph, act in, pose for, model for, print, sell, offer for sale, give away, exhibit, televise, publish, or offer to publish, or have in his possession or under his control, or otherwise distribute, make, display, or exhibit any obscene book, magazine, story, pamphlet, paper, writing, card, advertisement, circular, print, pictures, photograph, motion picture film, image, cast, slide, figure, instrument, statue, drawing, phonograph record, me-

chanical recording, or presentation, or other article which is obscene, shall be fined not more than One Thousand Dollars ($1,000) nor imprisoned more than one (1) year in the county jail or both.

Section 2. Whoever shall knowingly offer for sale, sell, give away, exhibit, televise, or otherwise distribute, make, display, or exhibit any obscene book, magazine, story, pamphlet, paper, writing, card, advertisement, circular, print, pictures, photograph, motion picture film, image, cast, slide, figure, instrument, statue, drawing, phonograph record, mechanical recording, or presentation, or other article which is obscene, to a minor shall be fined not more than Two Thousand, Five Hundred Dollars ($2,500.00) nor imprisoned in the county jail more than two (2) years or both.

Section 3. For purposes of this article the word "obscene" is defined as whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests. Provided, further, for the purpose of this article, the term "contemporary community standards" shall in no case involve a territory or geographic area less than the State of Texas.

Section 4. Whoever shall be convicted for the second time of a violation of this article shall be deemed guilty of a felony and shall be punished by confinement in the State penitentiary for not more than five (5) years or by a fine of not more than Ten Thousand Dollars ($10,000.00) or by both such fine and imprisonment.

Sec. 5. It shall be a defense to any charges brought hereunder if such prohibited matter or act shall be regularly in use in any bona fide, religious, educational or scientific institution or the subject of a bona fide scientific investigation.

The provisions of this Act shall not apply to any motion pictures produced or manufactured as commercial motion pictures which (1) have the seal under the Production Code of the Motion Picture Association of America, Inc.; or (2) legally move in the interstate commerce under Federal Law; or (3) are legally imported from foreign countries into the United States and have been passed by a Customs Office of the United States Government at any port of entry.

The provisions of this Act shall not apply to any daily or weekly newspaper.

Sec. 6. The district courts of this State and the judges thereof shall have full power, authority, and jurisdiction, upon application by any district or county attorney within their respective jurisdictions, to issue any and all proper restraining orders, temporary and permanent injunctions, and any other writs and processes appropriate to carry out and enforce the provisions of this Act.

under authority of 42 U.S.C. Section 1983 and 1985 by Brent Stein, individually and on behalf of the class similarly situated.

Plaintiff, Stein, is the publisher of an underground by-weekly newspaper, known as the "Dallas Notes." The class which he represents is composed of present and future employees of and contributors to the "Dallas Notes," and persons engaged in the distribution of the "Dallas Notes." The defendants, all of whom are sued in their official capacities, are Henry Wade, District Attorney of Dallas County, Charles Batchelor, Chief of Police, City of Dallas, and three members of the Dallas Police Department.

Plaintiff alleges that the Defendant police have engaged in a deliberate course of treatment designed to harass Plaintiff, for the purpose of suppressing the dissemination of the "Dallas Notes" and the political views expressed therein. They allege further that as a result of two searches of Stein's residence by the police (a portion of the first floor of his residence is used as a work area) there are presently pending against him two misdemeanor cases in the County Criminal Courts of Dallas County, charging him with possession of obscene "paper" and "pictures" in violation of Article 527 of the Texas Penal Code. Plaintiff alleges that he wishes to continue publication of the "Dallas Notes" and fears future arrests and prosecutions under Article 527 unless the rights of the parties thereunder are declared by this Court.

Plaintiff prays (1) for an injunction against Defendants enjoining them from arresting, presenting for indictment, or prosecuting Plaintiff (with the ex-

ception of presently pending causes) under Article 527 of the Penal Code of the State of Texas and (2) for a declaratory judgment declaring Article 527 to be unconstitutional on its face and as applied to Plaintiff. Plaintiff also prays (3) for an injunction against Dallas Police enjoining any arrest of Plaintiff or seizure of his property on the grounds of obscenity without a prior determination of the obscene character of the material in question and requiring the issuance of various instructions to the Police Department.

We find that the prayers for an injunction against any arrest or seizure and for the issuance of instructions is based on the alleged harassment and is not an attack upon the constitutionality of a statute. It is therefore not a subject for a three-judge court.

Therefore, after disposing of the motion for summary judgment this Court will decline to exercise any pendant jurisdiction, which it may have over the remaining claims, and will remand the remainder of the case, for determination by a single District Judge.

Plaintiff, pursuant to Rule 56 of the Federal Rules of Civil Procedure, has filed a motion for partial Summary Judgment praying that Article 527 be declared unconstitutional.

All Defendants have filed Motions to Dismiss, relying primarily upon (1) the federal anti-injunction statute 28 U.S.C. section 2283 (2) the abstention doctrine and (3) the failure to raise a substantial constitutional question.

Plaintiff contends Article 527 is unconstitutional for the following reasons: (1) that is makes mere possession of obscene material a crime; (2) that it is an

overbroad regulation of expression since the definition of obscenity does not require that the material be utterly without redeeming social value; and (3) that it offends the equal protection clause of the fourteenth amendment because Section 5 exempts daily and weekly but not bi-weekly newspapers from the operation of the statute.

An Amicus Curiae filed a brief with the permission of the Court and in addition to the contentions of plaintiff, Amicus Curiae contends that the statute improperly limits the geographical area within which contemporary community standards are to be measured and applied and fails to provide certain procedural safeguards.

Considering first Defendants' contentions in their motion to dismiss we find them without merit. The claim that 28 U.S.C. 2238[2] bars injunctive relief is answered in *Dombrowski v. Phister*, 380 U.S. 479 (1965). The Supreme Court in that case held the statute did not apply to prosecutions that arise after the filing of the complaint in the district court. The Court declared:

> "This statute (2283) and its predecessors do not preclude injunctions against the institution of state court proceedings, but only bar stays of suits already instituted. . . . Since the grand jury was not convened and indictments were not obtained until after the filing of the complaint, which sought interlocutory as well as permanent relief, no state

[2] 28 U.S.C. 2283 provides as follows: "A Court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by Act of Congress or where necessary in aid of its jurisdiction or to protect or effectuate its judgments."

"Proceedings" were pending within the intendment of 2283", *Id.* at 484 n.2.

See also Cameron v. Johnson, S.D. Miss. 1966, 262 F. Supp. 873 and *Landry v. Daly*, N.D. Ill. 1968, 288 F. Supp. 200, 221-224. In the case before us Plaintiff is seeking to enjoin only future prosecutions and the anti-injunction statute does not apply.

The second contention of Defendants that this Court should abstain until the State Courts have had an opportunity to pass on the constitutionality of the statute was likewise considered in *Dombrowski v. Phister, supra.* There Louisiana's Subversive Activities and Communist Control Law was attacked as being unconstitutional. A three-judge court dismissed holding the abstention doctrine applied. The Supreme Court reversed, declaring:

> "We hold the abstention doctrine is inappropriate for cases such as the present one where - - - statutes are justifiably attacked on their face as abridging free expression." p. 489.

We believe that the case before us is similar to *Dombrowski* in its attack on the Texas obscenity statute and that we should not abstain.

As to whether a substantial constitutional question is raised is was held in *Ex parte Boresky*, 290 U.S. 30 (1933) "[t]he existence of a substantial question of constitutionality must be determined by the allegations of the bill of complaint."

With reference to the allegations in the case before us we cite the case of *Phelper v. Decker*, 5th Cir. 1968, 401 F.2d 232. Petitioner in that case had been convicted of possessing obscene material in violation of

Article 527 of the Texas Penal Code. The Circuit Court, while refusing to consider the constitutionality of the Statute because of the failure of petitioner to exhaust state remedies, declared with reference to its constitutionality at page 240

> "Since the Texas Statute is utterly devoid of any language that requires a finding that the material must have no redeeming social value, it may be constitutionally suspect."

In the case before us the constitutionality of the statute is attacked on various grounds which we believe satisfy the requirements of substantiality.

Before discussing the merits of this controversy, we wish to re-emphasize that consideration of the Motion for summary judgment does not in any way involve an appraisal of the constitutionality of the application of Article 527 to Plaintiff. Our sole concern is the determination of whether the statute is constitutionally defective on its face.

Section 1 of Article 527 provides:

> "Whoever shall knowingly photograph, act in, pose for, model for, print, sell, offer for sale, give away, exhibit, televise, publish, or offer to publish, or have in his possession or under his control, or otherwise distribute, make, display, or exhibit any obscene book, magazine, . . . or other article which is obscene . . ."

In view of *Stanley v. Georgia*, — U.S. —, 37 L.W. 4315 (April 7, 1969), the above section is clearly unconstitutional in so far as it makes mere possession of obscene material a crime. A difficult question remains, however, concerning the extent to which Section 1 is affected by *Stanley*. The State points out that the ses-

sion law of which Article 527 is the codification (Chapter 461, Acts 57 Leg. R.S. 1961, Ch. 461, p. 1041), contains a severability clause and argues that only the portion reading "have in his possession or under his control" is affected by the *Stanley* decision. We do not agree.

Although the narrow holding of *Stanley* is simply that "the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime," we think that the case also stands for a broader proposition. Since *Stanley* involved a direct review of a state conviction for possession of obscene matter, the narrow holding was sufficient to reverse the conviction; thus it was not necessary for the Court to base its decision on a broader ground. It is impossible, however, for this Court to ignore the broader implications of the opinion which appears to reject or significantly modify the proposition stated in *Roth v. United States*, 354 U.S. 476, 485 (1957), that "obscenity is not within the area of constitutionally protected speech or press."

In *Roth* the Supreme Court declared that obscenity is not protected by the First Amendment, whereas non-obscene expression is fully protected, unless excludable because of encroachment upon the limited area of more important interests. The exclusion of obscenity from First Amendment protection was justified on the theory that obscenity is devoid of ideas having even the slightest redeeming social value. The following passages from the *Stanley* opinion appear to modify the dichotomy between protected and unprotected expression by recognizing that at least in some contexts obscenity is afforded First Amendment protection and thus cannot constitutionally be regulated in the absence of a legitimate countervailing societal interest:

> "*Roth* and its progeny certainly do mean that the First and Fourteenth Amendments recognize a valid governmental interest in dealing with the problem of obscenity. But the assertion of that interest cannot, in every context, be insulated from all constitutional protections."
>
> "It is now well established that the Constitution protects the right to receive information and ideas. . . . This right to receive information and ideas, regardless of their social worth . . . is fundamental to our free society. Moreover, in the context of this case—a prosecution for mere possession of printed or filmed matter in the privacy of a person's own home—that right takes on an added dimension. For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusion into one's privacy."

Stanley expressly holds that obscenity is protected in the context of mere private possession and in our opinion further suggests that obscenity is deprived of this protection only in the context of "public actions taken or intended to be taken with respect to obscene matter."[1]

Of course, the First Amendment does not confer absolute immunity from regulation. The State may regulate even non-obscene expression if there is a legitimate state interest. However, *Stanley* also indicates that in the context of "private" expression here is unlikely to be any legitimate state interest justifying regulation (with the possible exception of the State's interest in protecting children).

---

[1] Indeed, *Stanley* may reasonably be read as supporting the proposition that obscenity is fully protected by the First Amendment, but that the State has a legitimate interest in regulating the public dissemination of ideas inimical to the public morality.

Applying the above discussion of the scope of the *Stanley* decision to the present case, we conclude that Section 1 as a whole is overboard in that it fails to confine its application to a context of public or commercial dissemination. In addition to proscribing the mere possession of obscene material, Section 1 states that "whosoever shall knowingly photograph, act in, pose for . . . print" etc. without any limitation that such activities be engaged in publicly or with the intent to publicly or commercially distribute the materials involved. Although a number of the phrases in their normal and natural usage connote a public activity, this Court is disinclined to separately analyze each phrase appearing in Section 1 to determine if it is constitutionally viable. In our opinion the various provisions of Section 1 are too numerous and interrelated for such an approach to be meaningful. We therefore hold that the whole of Section 1 is unconstitutional for failure to confine its application to a context of public or commercial dissemination.

Next we consider Plaintiff's contention that the absence of any language in the definition of "obscene" requiring that the material be "utterly without redeeming social value" renders Article 527 an impermissibly vague and overboard regulation of expression.

Article 527 defines "obscene" as "whether to the average person applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests."

This is the definition of obscenity contained in *Roth v. United States*, 354 U.S. 476 (1957). While the Court in *Roth* did not include in its definition, per se, that

material to be obscene must be "utterly without redeeming social value" it quoted the following from *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-572 (1942):

> ". . . There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene. . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality - - - "

In *Jacobellis v. Ohio*, 378 U.S. 184 (1963) the Supreme Court declared at 191 that while the test in *Roth*

> "is not perfect, we think any substitute would raise equally difficult problems and we therefore adhere to that standard".

The Court, however, went on to say:

> "We would reiterate, however, our recognition in *Roth* that obscenity is excluded from the constitutional protection only because it is 'utterly without redeeming social importance' - - - ". *Id.*

While in both *Roth* and *Jacobellis* there is a recognition by the Court that material to be obscene, must be "utterly without redeeming social value" these words are not included in the definition.

In *Memoirs v. Massachusetts*, 383 U.S. 413 (1965), however, the Supreme Court went further when it declared at 418 that in order for material to be obscene:

> "Under this (*Roth*) definition as elaborated in subsequent cases, three elements must coalesce; it

must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value."

The Fifth Circuit has not passed directly on the question before us but in the case of *Phelper v. Decker* the Court made this comment at p. 40 on the statute before us:

> "Since the Texas Statute is devoid of any language that requires a finding that the material must have no redeeming social value it may be constitutionally suspect."

The definition of "obscene" in Article 527 does not appear to have been construed by the Texas Courts. In this circumstance we must place our own construction on the statute.

It is clear to us that the Supreme Court in *Memoirs* has added to the definition per se, of "obscene" in the *Roth* case by including in it the provision that to be "obscene" material must be "utterly without redeeming social value." Thus without such inclusion the Texas statute is unconstitutional.

As to the Plaintiff's contention concerning contemporary community standard, we assume *arguendo* that national standards are constitutionally required. See *Jacobellis v. Ohio, supra,* at 192-195. This portion of Article 527 apparently has not been construed by the Texas courts. In our opinion Article 527 may reasonably be construed as merely rejecting "local" (i.e. less than state-wide) community standards, and thus is not constitutionally deficient.

Amicus Curiae contends that Article 527 is unconstitutional because it lacks any provision for an adversary hearing on the question of obscenity prior to seizure, citing *inter alia Marcus v. Search Warrant*, 367 U.S. 717 (1961), *Quantity of Books v. Kansas*, 378 U.S. 205 (1964), and *Freedman v. Maryland*, 380 U.S. 51 (1965).

We conclude, however, that the absence of such a provision does not invalidate the statute. None of the cases cited support this proposition. In most of the cases cited the Supreme Court reversed a conviction because the *procedures* involved were inadequate. And in *Freedman v. Maryland* the statute declared unconstitutional was not a penal statute such as Article 527, but a civil statute which required that all films be submitted to a Board of Censors before being shown to the public.

As the State points out, there is at least one procedure whereby Article 527 as written may be constitutionally enforced; police officers can purchase material, and prosecutions can be instituted on the basis of the purchased articles.

If, in fact, constitutionally suspect procedures are followed in enforcing Article 527, then the constitutionality of such procedures can be collaterally attacked in federal court without the necessity of exhausting state remedies. The *Dombrowski* rationale, if not the precise holding itself, would apply to this situation since First Amendment rights may be irretrievably lost by a seizure of Constitutionally protected publications. *See e.g. Poulos v. Rucker*, M.D. Ala. 1968, 288 F. Supp. 305.

We will not pass upon Plaintiff's contention that the exemption of daily and weekly but not bi-weekly newspapers from the operation of Article 527 offends the equal protection clause of the Fourteenth Amendment. Since this ground of attack does not involve an allegation that the statute on its face is repugnant to the First Amendment, *Dombrowski* does not compel us to dispense with abstention and the limitation upon the exercise of federal equity jurisdiction.

In conclusion, Section 1 of Article 527 is impermissibly and unconstitutionally broad. The definition of "obscene" in Section 3 should include a requirement that the material be "utterly without redeeming social value." Plaintiff is entitled to a declaratory judgment to this effect and to injunctive relief against the future enforcement of Sections 1 and 2.

Judgment will be entered in accordance with the declarations and conclusions reached herein.

(Filed June 27, 1969)

IN THE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. 3-2951-B

BRENT STEIN

Plaintiff

vs.

CHARLES BATCHELOR, Chief of Police, City of Dallas; T. C. SNIDER, V. D. MONAGHAN, R. D. RODGERS, and HENRY WADE, District Attorney, Dallas County

Defendants

FINAL JUDGMENT AS TO PART OF PLAINTIFF'S CLAIMS

This action came on for hearing on Plaintiff's Motion for Partial Summary Judgment before a three-judge court composed of the Hon. Sarah T. Hughes, the Hon. Irving Goldberg, and the Hon. H. O. Woodward and the issues having been duly heard and a decision having been duly rendered in an opinion filed with the Clerk on June 9, 1969.

IT IS ORDERED, ADJUDGED AND DECREED:

1. Section 1 of Article 527 of the Texas Penal Code, Acts of 1961 57th Legislature entitled "Acts

involving obscene articles, objects, and materials; fines and penalties; exemption." is hereby declared to be impermissibly broad and unconstitutional.

2. The definition of obscene as set forth in Section 3 of the aforesaid statute is unconstitutional because of failure of that definition to include a requirement that the material be utterly without a redeeming social value.

3. Defendants are permanently enjoined from future enforcement of Sections 1 and 2 of Article 527 of the Texas Penal Code, Acts of 1961, 57th Legislature entitled "Acts involving obscene articles, objects, and materials; fines and penalties; exemptions." as against Plaintiff.

4. All claims and issues not herein determined are reserved for determination by a single judge of this court.

ENTERED this 27 day of June, 1969.

IRVING L. GOLDBERG
Judge, United States Court
of Appeals, Fifth Circuit

SARAH T. HUGHES
Judge, United States
District Court

HALBERT O. WOODWARD
Judge, United States
District Court

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, [redacted] 1970

NO. [redacted] 41

CHARLES BATCHELOR, Chief of Police
City of Dallas; T. C. SNIDER,
V. D. MONAGHAN, R. D. RODGERS, and
HENRY WADE, District Attorney, Dallas County
Appellants

v.

BRENT STEIN,
Appellee

ON DIRECT APPEAL FROM THE UNITED STATES
THREE-JUDGE DISTRICT COURT FOR THE
NORTHERN DISTRICT OF TEXAS

JURISDICTIONAL STATEMENT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

NO.

CHARLES BATCHELOR, Chief of Police
City of Dallas; T. C. SNIDER,
V. D. MONAGHAN, R. D. RODGERS, and
HENRY WADE, District Attorney, Dallas County
Appellants

v.

BRENT STEIN,
Appellee

ON DIRECT APPEAL FROM THE UNITED STATES
THREE-JUDGE DISTRICT COURT FOR THE
NORTHERN DISTRICT OF TEXAS

JURISDICTIONAL STATEMENT

Appellants' appeal from the judgment of the United States Three-Judge District Court for the Northern District of Texas, entered on June 27, 1969, declaring the Texas Obscenity Statute, Article 727b, Texas Penal Code to be unconstitutional in part and enjoining the enforcement of such statute; and Appellants submit this Jurisdictional Statement, pursuant to Rule 15 of the Rules of the Supreme Court, to show that the Supreme Court of the United States has

jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The Three-Judge Court below, the United States District Court for the Northern District of Texas, entered an opinion on June 9, 1969, holding the Texas Obscenity Statute, Article 527, Texas Penal Code to be unconstitutional and determining that an injunction would lie against its enforcement by state officers and officials. This opinion is not reported, and a copy is attached hereto as Appendix A. The judgment of the Court below, entered in conformity with the earlier opinion, was rendered on June 27, 1969, and a copy of such judgment is appended as Appendix B.

JURISDICTION

This suit was brought under the provisions of 42 U.S.C., Sections 1983 and 1985, and 28 U.S.C., Sections 1343 (3)(4), 2201, 2202, 2281, 2283 and 2284, in the United States District Court for the Northern District of Texas to enjoin the enforcement of Article 527 of the Texas Penal Code, on the ground that such statute was unconstitutional. A three-judge district court was formed to hear this cause as provided for by 28 U.S.C., Section 2284. The final judgment of the Court was entered on June 27, 1969, which judgment held Article 527 was unconstitutional and granted an injunction against its enforcement by state officers. Notice of appeal was filed in that Court on July 9, 1969.

The jurisdiction of the Supreme Court to review

the decision of the three-judge court is conferred by 28 U.S.C., Sections 1253, 2101(a)(b) and 2281. The following cases sustain the jurisdiction of the Supreme Court to review the judgment in this case on direct appeal: *Florida Lime and Avocado Growers, Inc.* v. *Jacobson*, 362 U.S. 73 (1960); *Ness Produce Co.* v. *Short*. 263 F. Supp. 586 (D.C. Or. 1966), affirmed 385 U.S. 537 (1967).

STATUTE INVOLVED

As noted above, the three-judge district court below held that Article 527, Texas Penal Code, was unconstitutional and restrained its enforcement. Article 527 has since been amended, but it read, in pertinent part at the time of the Court's decision as follows:

> Art. 527. 509 Acts involving obscene articles, objects and materials; fines and penalties; exemptions
>
> Section 1. Whoever shall knowingly photograph, act in, pose for, model for, print, sell, offer for sale, give away, exhibit, televise, publish, or offer to publish, or have in his possession or under his control, or otherwise distribute, make, display, or exhibit any obscene book, magazine, story, pamphlet, paper, writing, card, advertisement, circular, print, pictures, photograph, motion picture film, image, cast, slide, figure, instrument, statute, drawing, phonograph record, mechanical recording, or presentation, or other article which is obscene; shall be fined not more than One Thousand Dollars ($1,000) nor imprisoned more than one (1) year in the county jail or both.
>
> Sec 2. Whoever shall knowing offer for sale,

sell, give away, exhibit, televise, or otherwise distribute, make, display, or exhibit any obscene book, magazine, story, pamphlet, paper, writing, card, advertisement, circular, print, pictures, photograph, motion picture film, image, cast, slide, figure, instrument, statute, drawing, phonograph record, mechanical recording, or presentation, or other article which is obscene, to a minor shall be fined not more than Two Thousand, Five Hundred Dollars ($2,500) nor imprisoned in the county jail more than two (2) years or both.

Sec. 3. For purposes of this article the word "obscene" is defined as whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests. Provided, further, for the purpose of this article, the term "contemporary community standards" shall in no case involve a territory or geographic area less than the State of Texas.

Sec. 4. Whoever shall be convicted for the second time of a violation of this article shall be deemed guilty of a felony and shall be punished by confinement in the State penitentiary for not more than five (5) years or by a fine of not more than Ten Thousand Dollars ($10,000) or by both such fine and imprisonment.

Sec. 5. It shall be a defense to any charges brought hereunder if such prohibited matter or act shall be regularly in use in any bona fide, religious, educational or scientific institution or the subject of a bona fide scientific investigation.

"

QUESTIONS PRESENTED

The following questions are presented by this appeal:

1. Whether, as held by the court below, Section 1, Article 527 of the Texas Penal Code is unconstitutional because of impermissible broadness?

2. Whether, as decided by the court below, the Texas obscenity statute, the said Article 527, is unconstitutional in its entirety, including Section 2 thereof, because, in Section 1 mere possession of obscenity is defined as a crime as well as public and commercial dissemination, when this prohibition against mere possession is separable from the remaining prohibitions of the statute?

3. Whether Section 3 of Article 527 is unconstitutional for not containing language that requires a jury or judicial finding that the material must have no redeeming social value expressed in the terms of *Memoirs v. Massachusetts*, 383 U.S. 413 (1965)?

4. Whether, as determined by the court below, Article 527, which defines obscenity in terms of *Roth v. United States*, 354 U.S. 476 (1957), is unconstitutionally deficient in its definition of obscenity?

5. Whether, the "redeeming social value" standard defined in *Memoirs v. Massachusetts*, supra, is a defense which must be urged and proved by a defendant charged with a violation of Article 527 or is "no redeeming social value" a matter that must be pleaded and proved affirmatively by the prosecution?

6. Whether, as stated by the court below, *Memoirs v. Massachusetts*, supra, overrules in part, modifies and extends *Roth v. United States*, supra?

7. Does "having a redeeming social value" mean that such material is not "obscene" or that even obscenity is constitutionally protected if it has a "redeeming social value," and is the court correct in its statement that *Stanley v. Georgia*, 394 U.S. 557 (1969), overrules *Roth v. United States*, supra, in part, because some "obscenity is afforded First Amendment protection" by the *Stanley* decision?

8. Whether the "community standards" expression used in *Memoirs v. Massachusetts*, refers to the "national" community, the "local" community, or some other geographical or political community?

9. Whether the court below can properly order injunctive relief, as it did, against the peace officers of the City of Dallas and the law enforcement officials of Dallas County in this case where prosecutions were pending, and whether the court improperly interpreted *Dombrowski v. Pfister*, 380 U.S. 479 (1965), and ignored *Cameron v. Johnson*, 390 U.S. 617 (1968), in reaching the conclusion that injunctive relief would lie in the present case?

10. Whether, as decided by the court below in its opinion of June 9, 1969, this cause of action is "a civil rights case brought under the authority of 42 U.S.C., Section 1983 and 1985 by Brent Stein, individually and on behalf of the class similarly situated"?

11. What exactly is the scope of review, decision

and permissible action of a three-judge federal court, to wit: (1) does the court properly determine only whether a statute is constitutional on its face and can be constitutionally applied, or (2) should the critical determination be whether the statute is being unconstitutionally *applied* to the plaintiffs; and what is the meaning of the words used first in *Ex Parte Bransford*, 310 U.S. 354 (1940) and referred to in *Evergreen Review v. Cahn*, 230 F.Supp. 498 (E.D. New York 1964); to wit:

> "It is necessary to distinguish between a petition for injunction on the ground of the unconstitutionality of a statute as applied, which requires a three-judge court, and a petition which seeks an injunction on the ground of the unconstitutionality of the result obtained by the use of a statute which is not attacked as unconstitutional. The latter petition does not require a three-judge court."

12. Was there a substantial federal question presented in this cause that would entitle the court below to rule that Article 527 is unconstitutional and/or did the action of the State of Texas in this cause merely show an "unconstitutionality of the result obtained by the use of the statute"?

STATEMENT OF THE CASE

Brent Stein, the Plaintiff below and Appellee here, published a newspaper known as the "Dallas Notes" twice monthly in Dallas, Texas. As noted in its masthead the paper is, or was, "a member of the Underground Press Syndicate (UPS) and Liberation News Service (LNS)." An allegedly typical paper is at-

tached to Stein's Motion for Summary Judgment which is a part of the record in this Court.

On October 30, 1968, Dallas police officers obtained a search warrant authorizing the search of premises where the newspaper was published. Under the warrant, officers seized a number of newspapers, materials and printing paraphernalia, and some allegedly obscene photographs. Later, on November 15, 1968, the Dallas police executed another search warrant and seized additional items related to the publication of the paper. In neither the October 30 seizure nor the November 15 seizure was there a prior, adversary determination of obscenity.

Two misdemeanor charges were filed against Stein charging the possession of obscene materials in violation of Article 527, Texas Penal Code, and such charges were pending at the time of the filing of this suit by Stein, during the pendency of this cause and at the time of the judgment of the court below. The gravamen of the charges was *possession*, not distribution. of obscene materials.

Stein instituted this action in the United States District Court for the Northern District of Texas, which, after amendment, asked for a declaratory judgment declaring Article 527 unconstitutional and praying for a permanent injunction against the enforcement of the statute by the Dallas police and by Henry Wade, the Dallas County District Attorney.

A three-judge court was convened, and it is the judgment of that court, declaring Article 527 uncon-

stitutional and restraining its enforcement, that is being appealed.

Appellants took the position below that Article 527 is constitutional on its face and may be enforced in a constitutional manner. Moreover, however defective the methods used in this particular case by the Dallas police (if defective they be), the Texas obscenity statute should not be held to be unconstitutional and its enforcement in toto be enjoined. Appellants take the same position in this Court.

THE QUESTIONS RAISED BY THE APPEAL ARE SUBSTANTIAL

The questions heretofore set out present, Appellants feel, separate and valid issues. However, some may be more conveniently and meaningfully discussed and argued when considered together.

Questions 1 and 2

1. Whether, as held by the court below, Section 1, Article 527 of the Texas Penal Code is unconstitutional because of impermissible broadness?

2. Whether, as decided by the court below, the Texas obscenity statute, the said Article 527, is unconstitutional in its entirety, including Section 2 thereof, because, in Section 1 mere possession of obscenity is defined as a crime as well as public and commercial dissemination when this prohibition against mere possession is separable from the remaining prohibitions of the statute?

* * *

The judgment of the court below held Article 527 "to be impermissibly broad and unconstitutional." This holding was grounded in part, on *Stanley v. Georgia*, 394 U.S. 557 (1969), which held unconstitutional a statute which forbade mere private possession of obscenity.

It is true that Section 1 of Article 527 purports to make unlawful, possession of obscenity, and certainly, since *Stanley*, mere possession of obscene material cannot be punished and that portion of Article 527, which seeks to enjoin private possession, is unenforceable. However, Section 1 also makes unlawful the *distribution* of obscenity, and it was the contention of Texas below that the entire section of the article should not be declared to be unconstitutional merely because a portion thereof is unenforceable.

Nevertheless, the court below, in its opinion handed down prior to judgment, that held that:

> "Applying the above discussion of the scope of the *Stanley* decision to the present case, we conclude that Section 1 as a whole is overbroad in that it fails to confine its application to a context of public or commercial dissemination. . . ."
>
> "Although a number of the phrases of their normal and natural usage connote a public activity, this Court is disinclined to separately analyze each phrase appearing in Section 1 to determine if it is constitutionally viable. In our opinion the various provisions of Section 1 are too numerous and interrelated for such an approach to be meaningful. We therefore hold that the whole of Section 1 is unconstitutional for a failure to confine its application to a context of public or commercial dissemination."

This holding below, not only renders the "distribution" portion of Section 1 inoperative, and thus precludes prosecutions for distribution of obscenity in Texas (except to minors and the "minors" section was also held to be unenforceable), but more critically, the reasoning below would unquestionably strike down many obscenity statutes in other states. This determination below thereby raises an issue of national importance, and this Court should review and finally decide the question of whether an obscenity statute enjoining both "possession" and "distribution" of obscenity can be constitutionally severable.

Questions 3, 4, 5, 6, and 7

3. Whether Section 3 of Article 527 is unconstitutional for not containing language that requires a jury or judicial finding that the material must have no redeeming social value expressed in the terms of *Memoirs v. Massachusetts*, 383 U.S. 413 (1965)?

4. Whether, as determined by the court below, Article 527, which defines obscenity in terms of *Roth v. United States*, 354 U.S. 476 (1957), is unconstitutionally deficient in its definition of obscenity?

5. Whether, the "redeeming social value" standards defined in *Memoirs v. Massachusetts*, supra, is a defense which must be urged and proved by a defendant charged with a violation of Article 527 or is "no redeeming social value" a matter that must be pleaded and proved affirmatively by the prosecution?

6. Whether, as stated by the court below, *Memoirs*

v. Massachusetts, supra, overrules in part, modifies and extends *Roth v. United States*, supra?

7. Does having a redeeming social value mean that such material is not "obscene" or that even obscenity is constitutionally protected if it has a "redeeming social value," and is the court correct in its statement that *Stanley v. Georgia*, 394 U.S. 557 (1969), overrules *Roth v. United States*, supra, in part, because some "obscenity is afforded First Amendment protection" by the *Stanley* decision?

* * *

Questions 3 through 7 are interwoven in that they all deal with the question of whether *Roth v. United States*, supra, is still alive and viable. The Court below determined that *Roth* has expired and that the portion of Article 527 that defined obscenity in the terms of *Roth* was unconstitutionally deficient. This determination was grounded first on the premises that *Memoirs v. Massachusetts*, supra, amended and added to the constitutional definition of obscenity as prescribed by *Roth*.

Second, the Court below reasoned from *Stanley v. Georgia*, supra, that that portion of *Roth*, which held that obscenity was not constitutionally protected, was overruled by *Stanley* which decision apparently holds that some obscenity, when privately possessed, is, in fact and law, constitutionally sanctioned.

The decision by the court below, that *Roth* has been overruled or modified by *Memoirs* and *Stanley*, raises serious questions that require a plenary hearing and ultimate resolution by the Supreme Court. This is

especially true since *Roth* has been the only case where a majority of the Supreme Court concurred on an obscenity test.

In *Roth* the Court said (354 U.S. at pages 483-485):

> "The unconditional phrasing of the First Amendment was not intended to protect every utterance. . . . All ideas having even the slightest redeeming social importance . . . have the full protection of the guarantee. . . . But implicit in the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason is mirrored in the universal judgment that obscenity should be restrained, reflected in the international agreement of over 50 nations, in the obscenity laws of all 48 states, and in the 20 obscenity laws enacted by the Congress from 1842 to 1956. This is the same judgment expressed by this court in Chaplinsky v. New Hampshire, 315 U.S. 568, 571-572: 'There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene. . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . .'"

The Court continued at page 485:

> "We hold that obscenity is not within the area of constitutionally protected speech or press."

Finally at page 489, the Court held the test of obscenity is:

"Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest."

As earlier indicated the three-judge court below found that *Memoirs* has added to the definition per se, of "obscene" in the *Roth* case by including in it the provision that to be "obscene" material must be "utterly without redeeming social value." Thus, without such inclusion the Texas statute is unconstitutional.

The portion of *Memoirs* referred by the Court above is the following expression (383 U.. at 418):

"Under this (*Roth*) definition as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value."

The "(a)" part of the *Memoirs*, quotation in the *Roth* definition of obscenity is contained in Article 527, that is, "(a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex."

The "(b)" part of the *Memoirs* recital, that is, "(b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters," apparently comes from *Manual Enterprises v. Day*, 370 U.S. 478 (1962) at page 486 of the Court's opinion by

Justices Harlan and Stewart. Only these two justices mentioned "patent offensiveness" and no majority of the Court agreed on any opinion.

However, the absence of the word "patently offensive" in the Texas statute was not found to be defective by the Court below.

Rather, the Court below found that the absence of any language requiring a finding that the alleged obscenity must be "utterly without redeeming social value," the "c" portion of the *Memoirs* quotation, rendered the Texas statute unconstitutional.

The "utterly without social value" expression seemingly made its appearance in *Jacobellis v. Ohio*, 378 U.S. 184 (1963) (although overtones of this view were noted in *Roth*), wherein Justice Brennan observed at page 191 of the Court's opinion:

> ". . . obscenity is excluded from constitutional protection only because it is 'utterly without redeeming social importance . . .'"

Only Justices Brennan and Goldberg concurred in the opinion, and Justice Brennan further stated at page 191:

> 'Recognizing that the test for obscenity (in *Roth*) . . . is not perfect, we think any substitute would raise equally difficult problems, and we therefore adhere to that standard."

Moreover, in a dissenting opinion in *Jacobellis*, Chief Justice Warren, joined by Justice Clark, said (378 U.S. at 200):

> "For all the sound and fury that the Roth test has generated, it has not been proven unsound, and I believe that we should try to live with it—at least until a more satisfactory definition is evolved . . ."

A definite test of obscenity is needed with a judicial determination being made by this Court as to whether measuring obscenity by *Roth* is still constitutionally valid or whether *Memoirs* is the new standard. Certainly, the decision in *Memoirs* does not illuminate or solve the problem. Only Justices Brennan and Fortas and Chief Justice Warren agreed on the Court's opinion reciting the necessity of three elements coalescing in obscenity cases, to wit, that:

(a) The dominant theme of the material must appeal to the prurient interest in sex (Roth),

(b) The material be patently offensive, and

(c) The material be utterly without redeeming social value.

Indeed, the opinion in *Memoirs*, 383 at 418, points out that the question, which was before the state courts in that case, was whether or not the subject book satisfied "the test of obscenity *established in Roth v. United States*. . . ." (Emphasis added)

Justice White dissented in *Memoirs*, noted at page 461 of the decision that:

> "To say that material within the *Roth* definition of obscenity is nevertheless not obscene if it has some redeeming social value is to reject one of the basic propositions of the *Roth* case—that such material is not protected *because* it is inherently

and utterly without social value." (Emphasis that of Justice White.)

And Justice Clark, in another dissenting opinion in *Memoirs* called the social value test "novel", (383 U.S. 443), noting that only three justices adhered to it, and observing that such test "rejects the basic holding of of *Roth*" (383 U.S. 441).

Later, in 1967, the Supreme Court, in *Redrup v. New York*, 386 U.S. 773, by per curiam opinon, noted that the three element test of *Memoirs* is one espoused by only certain justices in the *Memoirs* case. Redrup pointly did not embrace the *Memoirs* test as that of the Court.

Accordingly, it is reiterated that the Supreme Court should, in this cause, lay to rest the confusion that presently exists and set a required constitutional standard by which to measure alleged obscenity. An answer by this Court to the following questions is important to every jurisdiction in this country, federal and state:

(1) Is the *Roth* test of obscenity still the law of the land?

(2) If so, may an accused show "a redeeming social value" as a defense to a charge of distributing alleged obscene materials?

(3) Is the "test" of obscenity now to be the three-pronged "test" noted in *Memoirs*?

(4) If so, must the prosecution prove all elements of the *Memoirs* "test," or is the "redeeming social

value" element a defense to the charges which must be shown by the defendant?

(5) If the *Memoirs* test is used, in whatever form decreed, does a finding of "a redeeming social value" mean that the material is not obscene or that even obscene material is protected when it has a redeeming social value?

(6) Does "*Stanley v. Georgia*" overrule that part of *Roth* which held that obscenity is not protected by the First Amendment to the Constitution of the United States because private possession of obscenity cannot be proscribed or punished?

Question 8

8. Whether the "community standards" expression used in *Memoirs v. Massachusetts*, refers to the national community, or some other geographical or political community?

* * *

The Texas obscenity statute, Article 527, as it was written at the time of the decision in this case contained the following language:

> "Provided, further, for the purpose of this article, the term 'contemporary community standards' shall in no case involve a territory or geographic area less than the State of Texas."

This language was attacked by Stein below as being unconstitutional, Stein claiming that the decisions of this Court required that a national community be the geographical area for determining whether obscene

materials appealed to the prurient interest of the people in such community. Stein cited *Jacobellis v. Ohio*, supra, in support of his contention.

While the three-judge court below did not hold the Texas statute unconstitutional for failing to require the national community, the court wrote in its opinion that it assumed "national standards are constitutionally required."

This question, whether a local, state, national or some other geographical community is proper, should be considered and decided by this Court even though the resolution of this issue was not determinative of the decision below.

Jacobellis v. Ohio, supra, cited by the court below as its reason for believing that a national standard or community is required, certainly gives no answer to the problem. Notice should again be made that there was really no majority opinion in *Jacobellis*. Justice Brennan wrote the opinion that appears first in the decision, joined only by Justice Goldberg; Justice Goldberg wrote a separate concurring opinion in which he stated he agreed with everything Brennan had written; Justice White concurred in the judgment of reversal only; Justices Black and Douglas concurred in the reversal for the reason that they believed that any motion picture has full First Amendment protection; Justice Stewart stated that only hard-core pornography can be constitutionally limited, and that the subject matter of the case was not hard-core pornography; Chief Justice Warren, joined by Justice Clark, wrote a dissenting opinion.

In the opinion of Justice Brennan, concurred in by Justice Goldberg, it was said at 378 U.S., page 195:

> ". . . the constitutionality status of an allegedly obscene work must be determined on the basis of a national standard. It is, after all, a national constitution we are expounding."

Justice Warren, joined by Justice Clark, observed (378 U.S. at 200):

> "It is my belief that when the Court said in *Roth* that obscenity is to be defined by reference to 'community standards,' it meant community standards not a national standard, as is sometimes argued. I believe that there is no provable 'national standard,' and perhaps there should be none."

Therefore, *Jacobellis* would indicate that two of the Justices that decided the case felt that it was a national standard by which obscenity must be measured, while two other Justices felt that the question of obscenity must be determined by use of local community standards.

It is accordingly submitted that a resolution of what "community standard" should be finally decided by this Court. The resolution of this issue is important to every obscenity prosecution that will be commenced in the Courts of this nation.

Questions 9, 10, 11, and 12

9. Whether the court below can properly order injunctive relief, as it did, against the peace officers of

the City of Dallas and the law enforcement officials of Dallas County in this case where prosecutions were pending, and whether the court improperly interpreted *Dombrowski v. Pfister*, 380 U.S. 479 (1965), and ignored *Cameron v. Johnson*, 390 U.S. 617 (1968), in reaching the conclusion that injunctive relief would lie in the present case?

10. Whether, as decided by the court below in its opinion of June 9, 1969, this cause of action is "a civil rights case brought under the authority of 42 U.S.C., Section 1983 and 1985 by Brent Stein, individually and on behalf of the class similarly situated"?

11. What exactly is the scope of review, decision and permissible action of a three-judge federal court, to wit: (1) does the court properly determine only whether a statute is constitutional on its face and can be constitutionally applied; or (2) should the critical determination be whether the statute is being unconstitutionaly *applied* to the plaintiffs; and what is the meaning of the words used first in *Ex Parte Bransford*, 310 U.S. 354 (1940) and referred to in *Evergreen Review v. Cahn*, 230 F.Supp. 498 (E.D. New York 1964); to wit:

> "It is necessary to distinguish between a petition for injunction on the ground of the unconstitutionality of a statute as applied, which requires a three-judge court, and a petition which seeks an injunction on the ground of the unconstitutionality of the result obtained by the use of a statute which is not attacked as unconstitutional. The latter petition does not require a three-judge court."

12. Was there a substantial federal question pre-

sented in this cause that would entitle the court below to rule that Article 527 is unconstitutional and/or did the action of the State of Texas in this cause merely show an "unconstitutionality of the result obtained by the use of the statute"?

* * *

The foregoing questions, questions 9 through 12, are all related to the propriety of forming a three-judge federal court and the scope of permissible action by the court after its formation.

Assuming arguendo that the three-judge court was properly constituted in this case, Appellants urge here, as they did below, that no injunctive relief should have been issued in this case. It is the state's contention that an injunction, as decreed by the court below, was improper under the principles and doctrines of equity and federalism. *Cameron v. Johnson*, 390 U.S. 617, 618 (1968); *Dombrowski v. Pfister*, 380 U.S. 479, 483-485 (1965).

The court below, however, relied on *Dombrowski v. Pfister*, supra, as authority for entering the arena of state prosecution at the early stages. This reliance apparently ignored the decision of this Court in *Cameron v. Johnson*, supra.

While the state prosecutions here charged possession of obscene matter and would hence be ineffective under the holding of *Stanley v. Georgia*, supra, Stein did not attempt to have the state courts pass on the validity of the charges prior to filing suit in federal court and, accordingly, the courts of Texas had no opportunity to apply *Stanley* to the facts of the pend-

ing charges against Stein. The determination of the applicability of *Stanley v. Georgia*, supra, as well as the validity of the Texas obscenity statute could have been tested prior to trial by habeas corpus in the Texas Court of Criminal Appeals. See *Ex Parte Sandford*, 289 S.W.2d 776 (1956).

It should also be noted that should allegedly obscene items be seized under a search warrant as was done here, Articles 18.25 and 18.26 of the Texas Code of Criminal Procedure specifically provide for a judicial inquiry into the grounds for holding the defendant and the property in question. Under these provisions the magistrate is enjoined to discharge the defendant and restore the property taken from him where he finds that there were not good grounds for the issuance of the warrant.

There was not a threat of continued state action here after the state courts had quashed arrest warrants and suppressed evidence, as was done in *Dombrowski*. Indeed, the Texas courts did not have the opportunity to pass on Stein's contentions. Appellant submits that Stein could, and should, have sought the return of the materials in question and a dismissal of the charges in the state courts of Texas, urging there, the arguments and authorities presented to the court below. See *Cameron v. Johnson*, supra, 390 U.S. at page 618.

The contentions of Stein with regard to the proper definition of obscenity, as well as all his other contentions, made in the federal court below, presuppose that state courts will ignore the case law of the Supreme Court and try the cases erroneously. It cannot be

presumed that state courts will not accord defendants their full federal and state constitutional rights in state court trials. *Walker v. Birmingham*, 388 U.S. 307, 319 (1967); *Harris v. N.A.A.C.P.*, 360 U.S. 167 (1959). The mere possibility of an erroneous application of constitutional standards will not justify federal courts' disrupting state proceedings. *Cameron v. Johnson*, supra; *Dombrowski v. Pfister*, supra. The state courts, presumably, would have construed Article 527 and applied it in keeping with constitutional principles, and the court below should have assumed that the state courts will do so. *Cameron v. Johnson*, supra; *Nesmith v. Alford*, 318 F.2d 110, 319 F.2d 859 (5th Cir., 1963), cert. denied in *Sullivan v. Nesmith*, 375 U.S. 975 (1964).

In *Brooks v. Briley*, 274 F.Supp. 538 (1967), affirmed 391 U.S. 361 (1968), a three-judge court of the Middle District of Tennessee said:

> "In our dual system of government we have rejected the concept of a national police force. Instead, we have committed to state and municipal authorities the primary responsibility for police protection and for the maintenance of law and order. Lacking such responsibility, the federal authority should be allowed to intrude itself through the Federal Courts into the law enforcement duties and activities of the states only when the necessity for such intrusion is clear and unmistakable. . ."

See also *Cameron v. Johnson*, supra; and *Zwicker v. Boll*, 270 F.Supp. 133 (Three-Judge Court, W.D. Wisconsin 1967), affirmed 391 U.S. 353 (1968).

It is submitted that injunctive relief was not proper

under the facts and circumstances as revealed below as no attempt was made to secure rulings on the questions presented in the federal proceeding in the courts of Texas.

A companion question is raised by the language of the court below at the beginning of its opinion rendered on June 9, 1969, prior to the final judgment, the court stating,

> "This case involves the constitutionality of Article 527 of the Texas Penal Code, . . . It is a civil rights case brought under authority of 42 U.S.C. section 1983 and 1985 by Brent Stein, individually and on behalf of the class similarly situated."

Arguendo, the facts as revealed in the Court below may have shown an illegal search and seizure and illegal prosecutions for the *possession* of obscenity, but there was no showing, Appellants submit, that the agents of the State of Texas deliberately sought to harass Stein except, perhaps, through zealous enforcement of a then valid Texas obscenity statute.

If this case can be said to fit within the provisions of 28 U.S.C. §1343(3)(4) then almost surely it can be stated that 28 U.S.C., Sections 2281 and 2284 apply. In other words, the plaintiff below could be said to have a right guaranteed by the Constitution of the United States denied because of an unconstitutional Texas statute; and to obtain injunctive relief on this ground, a three-judge district court would be required to determine the issue of unconstitutionality and grant any appropriate injunctive relief.

However, in the guise of a civil rights suit under 42 U.S.C., Sections 1983 and 1985 as determined by the court below (Section 1985 is especially inappropriate), some authority seems to support the proposition that a three-judge federal court is not necessary to order injunctive relief where a state statute is found to be unconstitutional and that one federal judge can issue injunctive relief. See *Holmes v. Danner*, 191 F.Supp. 394 (D.C. Ga. 1961); and *Sheldon v. Fannin*, 221 F. Supp. 766 (D.C. Ariz. 1963).

In the opinion below, the court said,

> "We find that the prayers for an injunction against any arrest or seizure and for the issuance of instructions is based on the alleged harassment and is not an attack upon the constitutionality of a statute. It is therefore not a subject for a three-judge court."

The above quoted language is seemingly inconsistent from the court's later determination that Article 527 is unconstitutional and that the police officers and law enforcement officials are therefore enjoined from enforcing the act "as against Plaintiff" Stein.

This gray area involving the proper applicability of 28 U.S.C., Sections 2281 and 2284, in cases where relief is grounded upon an unconstitutional state statute, should be eliminated by this Court. It is arguable that "any harassment" here was engendered only because of Article 527 and for the courts to enjoin the operation of Article 527 there must be a determination made, as was done below, that the statute is unconstitutional. Injunctive relief can only then

be proper when ordered by a three-judge district court. It follows in this context, or seems to Appellants to follow, that there is no basis for the statement of the court below that this is a civil rights case arising under 42 U.S.C., Sections 1983 and 1995, when the Court went on to determine the unconstitutionality of Article 527.

It is urged that this Court should clear up the confusion which apparently exists in the opinion of the court below on the interrelation of the civil rights provisions of Title 42 and Title 28 and the proper application of each in a case such as is presented here.

There is an additional problem inherent in the case below and in all three-judge federal court cases. Is the scope of the court's inquiry merely to be a determination as to whether the challenged statute is constitutional on its face and is capable of constitutional application by the state authorities? See the statement in the opinion below wherein the Court states at page 6 of the opinion, "Our sole concern is the determination of whether the statute is constitutionally defective on its face," and *Dombrowski v. Pfister*, supra, 380 U.S. at page 491, where the Court speaks of a statute being "attacked on its face." Or should the inquiry be expanded or limited to a determination of whether the statute is being unconstitutionally applied? See *Ex Parte Bransford*, supra.

The proper boundaries by a three-judge federal court is of critical, nationwide importance in our federal system. Should such a court only decide if a state statute is constitutional on its face or should its in-

quiry be directed to a consideration of whether the statute, as applied, is unconstitutional; and should this latter inquiry, if proper, be directed to determining whether the statute is *usually* given constitutional application by state authorities or whether the court should look only to the particular situation presented in reaching a decision on constitutional application.

Here, arguendo, Appellant will concede that the procedures used in enforcing Articles 527 were not constitutionally permissible and that, possibly, an unconstitutional result, as defined by *Ex Parte Bransford*, supra, was obtained by the use of the statute. But again, should these circumstances authorize the empaneling of a three-judge federal court? Appellants submit that the permissible scope of action by a three-judge federal court is not now clearly defined and that this question should be answered by the Supreme Court in order to provide guidelines in future three-judge court controversies involving constitutionality of state statutes.

CONCLUSION

The three-judge federal court below incorrectly held the Texas obscenity statute, Article 527, to be unconstitutional for the reasons given above. Furthermore, whether Article 527 be constitutional or unconstitutional, the court below erroneously, under the principles of federalism, enjoined state officials from enforcing the statute.

Jurisdiction is clear, and the questions presented are so substantial and of national importance as to require plenary consideration by this Court.

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CERTIFICATE OF SERVICE

I, Lonny F. Zwiener, a member of the Bar of the Supreme Court of the United States, do hereby certify that a copy of the foregoing Jurisdictional Statement has been served on counsel for the Appellee by depositing same in the United States Mail, postage prepaid, addressed to Mr. David R. Richards, 205 Texas AFL-CIO Building, 308 West 11th Street, Austin, Texas 78701, this the ..... day of ....., 1969.

LONNY F. ZWIENER
Assistant Attorney General

APPENDIX A

IN THE UNITED STATE DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

BRENT STEIN Plaintiff, v. CHARLES BATCHELOR, Chief of Police, City of Dallas; T. C. SNIDER, V. D. MONAGHAN, R. D. RODGERS, and HENRY WADE, District Attorney, Dallas County Defendants.	)	Civil Action 3-2951-B

Before GOLDBERG, Circuit Judge, HUGHES and WOODWARD, District Judges.

HUGHES:

This case involves the constiutionality of Article 527 of the Texas Penal Code, entitled "Acts involving obscene articles, objects, and materials; fines and penalties; exemptions." It is a civil rights case

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Section 1. Whoever shall knowingly photograph, act in, pose for, model for, print, sell, offer for sale, give away, exhibit, televise, publish, or offer to publish, or have in his possession or under his control, or otherwise distribute, make, display, or exhibit any obscene book, magazine, story, pamphlet, paper, writing, card, advertisement, circular, print, pictures, photograph, motion picture film, image, cast, slide, figure, instrument, statue, drawing, phonograph record, mechanical recording, or presentation, or other article which is obscene, shall be fined not more than One Thousand Dollars ($1,000) nor imprisoned more than one (1) year in the county jail or both.

Section 2. Whoever shall knowingly offer for sale, sell, give away, exhibit, televise, or otherwise distribute, make, display, or exhibit any obscene book, magazine, story,

brought under authority of of 42 U.S.C. section 1983 and 1985 by Brent Stein, individually and on behalf of the class similarly situated.

---

pamphlet, paper, writing, card, advertisement, circular, print, pictures, photograph, motion picture film, image, cast, slide, figure, instrument, statue, drawing, phonograph record, mechanical recording, or presentation, or other article which is obscene, to a minor, shall be fined not more than Two Thousand Five Hundred Dollars ($2,500.00) nor imprisoned in the county jail more than two (2) years or both.

Section 3. For purposes of this article the word "obscene" is defined as whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests. Provided further, for the purpose of this article, the term "contemporary community standards" shall in no case involve a territory or geographic area less than the State of Texas.

Section 4. Whoever shall be convicted for the second time of a violation of this article shall be deemed guilty of a felony and shall be punished by confinement in the State penitentiary for not more than five (5) years or by a fine of not more than Ten Thousand Dollars ($10,000.00) or by both such fine and imprisonment.

Sec. 5. It shall be a defense to any charges brought hereunder if such prohibited matter or act shall be regularly in use in any bona fide, religious, educational or scientific institution or the subject of a bona fide scientific investigation.

The provisions of this Act shall not apply to any motion pictures produced or manufactured as commercial motion pictures which (1) have the seal under the Production Code of the Motion Picture Association of America, Inc.; or (2) legally move in the interstate commerce under Federal Law; or (3) are legally imported from foreign countries into the United States and have been passed by a Customs Office of the United States Government at any port of entry.

The provisions of this Act shall not apply to any daily or weekly newspaper.

Sec. 6. The district courts of this State and the judges thereof shall have full power, authority, and jurisdiction, upon application by any district or county attorney within their respective jurisdictions, to issue any and all proper restraining orders, temporary and permanent injunctions, and any other writs and processes appropriate to carry out and enforce the provisions of this Act.

Plaintiff Stein is the publisher of an underground, bi-weekly newspaper, known as the "Dallas Notes". The class which he represents is composed of present and future employees of and contributors to the "Dallas Notes", and persons engaged in the distribution of the "Dallas Notes". The defendants, all of whom are sued in their official capacities, are Henry Wade, District Attorney of Dallas County, Charles Batchelor, Chief of Police, City of Dallas, and three members of the Dallas Police Department.

Plaintiff alleges that the Defendant police have engaged in a deliberate course of treatment designed to harass Plaintiff, for the purposes of suppressing the dissemination of the "Dallas Notes" and the political views expressed therein. They allege further that as a result of two searches of Stein's residence by the police (a portion of the first floor of his residence is used as a work area) there are presently pending against him two misdemeanor cases in the County Criminal Courts of Dallas County, charging him with possession of obscene "paper" and "pictures" in violation of Article 527 of the Texas Penal Code. Plaintiff alleges that he wishes to continue publication of the "Dallas Notes" and fears future arrests and prosecutions under Article 527 unless the rights of the parties thereunder are declared by this Court.

Plaintiff prays (1) for an injunction against Defendants enjoining them from arresting, presenting for indictment, or prosecuting Plaintiff (with the exception of presently pending causes) under Article 527 of the Penal Code of the State of Texas and (2) for a declaratory judgment declaring Article 527 to

be unconstitutional on its face and as applied to Plaintiff. Plaintiff also prays (3) for an injunction against Dallas Police enjoining any arrest of Plaintiff of seizure of his property on the grounds of obscenity without a prior determination of the obscene character of the material in question and requiring the issuance of various instructions to the Police Department.

We find that the prayers for an injunction against any arrest or seizure and for the issuance of instructions is based on the alleged harassment and is not an attack upon the constitutionality of a statute. It is therefore not a subject for a three-judge court.

Therefore, after disposing of the motion for summary judgment this Court will decline to exercise any pendant jurisdiction, which it may have over the remaining claims, and will remand the remainder of the case for determination by a single District Judge.

Plaintiff, pursuant to Rule 56 of the Federal Rules of Civil Procedure, has filed a motion for partial Summary Judgment praying that Article 527 be declared unconstitutional.

All Defendants have filed Motions to Dismiss, relying primarily upon (1) the federal anti-injunction statute 28 U.S.C. section 2283 (2) the abstention doctrine and (3) the failure to raise a substantial constitutional question.

Plaintiff contends Article 527 is unconstitutional for the following reasons: (1) that it makes mere possession of obscene material a crime; (2) that it is an

overbroad regulation of expression since the definition of obscenity does not require that the material be utterly without redeeming social value; and (3) that is offends the equal protection clause of the fourteenth amendment because Section 5 exempts daily and weekly but not bi-weekly newspapers from the operation of the statute.

An Amicus Curiae filed a brief with the permission of the Court and in addition to the contentions of plaintiff, Amicus Curiae contends that the statute improperly limits the geographical area within which contemporary community standards are to be measured and applied and fails to provide certain procedural safeguards.

Considering first Defendants' contentions in their motion to dismiss we find them without merit. The claim that 28 U.S.C. 2283[2] bars injunctive relief is answered in *Dombrowski v. Phister*, 380 U.S. 479 (1965). The Supreme Court in that case held the statute did not apply to prosecutions that arise after the filing of the complaint in the district court. The Court declared:

> "This statute (2283) and its predecessors do not preclude injunctions against the institution of state court proceedings, but only bar stays of suits already instituted . . . Since the grand jury was not convened and indictments were not obtained until after the filing of the complaint, which

[2] 28 U.S.C. 2283 provides as follows: "A Court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by Act of Congress or where necessary in aid of its jurisdiction or to protect or effectuate its judgments."

sought interlocutory as well as permanent relief, no state "Proceedings" were pending within the intendment of 2283". *Id.* at 484 n. 2.

See also Cameron v. Johnson, S.D. Miss. 1966, 262 F.Supp. 873 and *Landry v. Daily*, N.D. Ill. 1968, 288 F.Supp. 200, 221-224. In the case before us Plaintiff is seeking to enjoin only future prosecutions and the anti-injunction statute does not apply.

The second contention of Defendants that this Court should abstain until the State Courts have had an opportunity to pass on the constitutionality of the statute was likewise considered in *Dombrowski v. Phister*, *supra*. There Louisiana's subversive Activities and Communist Control Law was attacked as being unconstitutional. A three-judge court dismissed holding the abstention doctrine applied. The Supreme Court reversed, declaring:

> "We hold the abstention doctrine is inappropriate for cases such as the present one where - - - statutes are justifiably attacked on their face as bridging free expression." p. 489.

We believe that the case before us is similar to *Dombrowski* in its attack on the Texas obscenity statute and that we should not abstain.

As to whether a substantial constitutional question is raised it was held in *Ex parte Boresky*, 290 U.S. 30 (1933) "[t]he existence of a substantial question of constitutionality must be determined by the allegations of the bill of complaint."

With reference to the allegation in the case before

us we cite the case of *Phelper v. Decker*, 5th Cir. 1968, 401 F.2d 232. Petitioner in that case had been convicted of possessing obscene material in violation of Article 527 of the Texas Penal Code. The Circuit Court, while refusing to consider the constitutionality of the Statute because of the failure of petitioner to exhaust state remedies, declared with reference to its constitutionality at page 240

> "Since the Texas Statute is utterly devoid of any language that requires a finding that the material must have no redeeming social value, it may be constitutionally suspect."

In the case before us the constitutionality of the statute is attacked on various grounds which we believe satisfy the requirements of substantiality.

Before discussing the merits of this controversy, we wish to re-emphasize that consideration of the Motion for summary judgment does not in any way involve an appraisal of the constitutionality of the application of Article 527 to Plaintiff. Our sole concern is the determination of whether the statute is constitutionally defective on its face.

Section 1 of Article 527 provides:

> "Whoever shall knowingly photograph, act in, pose for, model for, print, sell, offer for sale, give away, exhibit, televise, publish, or offer to publish, or have in his possession or under his control, or otherwise distribute, make, display, or exhibit any obscene book, magazine, . . . or other article which is obscene . . ."

In view of *Stanley v. Georgia*, U.S. , 37 L.W.

4315 (April 7,1969) the above section is clearly unconstitutional in so far as it makes mere possession of obscene material a crime. A difficult question remains, however, concerning the extent to which Section 1 is affected by *Stanley*. The State points out that the session law of which Article 527 is the codification (Chapter 461, Acts 57 Leg. R.S. 1961, Ch. 461, p. 1041), contains a severability clause and argues that only the portion reading "have in his possession or under his control" is affected by the *Stanley* decision. We do not agree.

Although the narrow holding of *Stanley is* simply that "the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime", we think that the case also stands for a broader proposition. Since *Stanley* involved a direct review of a state conviction for possession of obscene matter, the narrow holding was sufficient to reverse the conviction; thus it was not necessary for the Court to base its decision on a broader ground. It is impossible, however, for this Court to ignore the broader implications of the opinion which appears to reject or significantly modify the proposition stated in *Roth v. United States*, 354 U.S. 476, 485 (1957) that "obscenity is not within the area of constitutionally protected speech or press."

In *Roth* the Supreme Court declared that obscenity is not protected by the First Amendment, whereas non-obscene expression is fully protected, unless excludable because encroachment upon the limited area of more important interests. The exclusion of obscenity from First Amendment protection was justi-

fied on the theory that obscenity is devoid of ideas having even the slightest redeeming social value. The following passages from the *Stanley* opinion appear to modify the dichotomy between protected and unprotected expression by recognizing that at least in some contexts obscenity is afforded First Amendment protection and thus cannot constitutionally be regulated in the absence of a legitimate countervailing societal interest:

> "*Roth* and its progeny certainly do mean that the First and Fourteenth Amendments recognize a valid governmental interest in dealing with the problem of obscenity. But the assertion of that interest cannot, in every context, be insulated from all constitutional protections."

> "It is now well established that the Constitution protects the right to receive information and ideas. . . . This right to receive information and ideas, regardless of their social worth . . . is fundamental to our free society. Moreover, in the context of this case - - a prosecution for mere possession of printed or filmed matter in the privacy of a person's own home - - that right takes on an added dimension. For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusion into one's privacy."

Stanley expressly holds that obscenity is protected in the context of mere private possession and in our opinion further suggests that obscenity is deprived of this protection only in the context of "public actions

taken or intended to be taken with respect to obscene matter".

Of course, the First Amendment does not confer absolute immunity from regulation. The State may regulate even non-obscene expression if there is a legitimate state interest. However, *Stanley* also indicates that in the context of "private" expression there is unlikely to be any legitimate state interest justifying regulation (with the possible exception of the State's interest in protecting children).

Applying the above discussion of the scope of the *Stanley* decision to the present case, we conclude that Section 1 as a whole is overbroad in that it fails to confine its application to a context of public or commercial dissemination. In addition to proscribing the mere possession of obscene material, Section 1 states that "whosoever shall knowingly photograph, act in, pose for . . . print" etc. without any limitation that such activities be engaged in publicly or with the intent to publicly or commercially distribute the materials involved. Although a number of the phrases in their normal and natural usage connote a public activity, this Court is disinclined to separately analyze each phrase appearing in Section 1 to determine if it is constitutionally viable. In our opinion the various provisions of Section 1 are too numerous and interrelated for such an approach to be meaningful. We therefore hold that the whole of Section 1 is unconsti-

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Indeed, *Stanley* may reasonably be read as supporting the proposition that obscenity is fully protected by the First Amendment, but that the State has a legitimate interest in regulating the public dissemination of ideas inimical to the public morality.

tutional for failure to confine its application to a context of public or commercial dissemination.

Next we consider Plaintiff's contention that the absence of any language in the definition of "obscene" requiring that the material be "utterly without redeeming social value" renders Article 527 an impermissibly vague and overbroad regulation of expression.

Article 527 defines "obscene" as "whether to the average person applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests."

This is the definition of obscenity contained in *Roth v. United States*, 354 U.S. 476 (1957). While the Court in *Roth* did not include in its definition, per se, that material to be obscene must be "utterly without redeeming social value" it quoted the following from *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-572 (1942):

> ". . . There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality - - - "

In *Jacobellis v. Ohio*, 378 U.S. 184 (1963) the Su-

preme Court declared at 191 that while the test in *Roth*

> "is not perfect, we think any substitute would raise equally difficult problems and we therefore adhere to that standard".

The Court, however, went on to say:

> "We would reiterate, however, our recognition in *Roth* that obscenity is excluded from the constitutional protection only because is is 'utterly without redeeming social importance' - - -" *Id.*

While in both *Roth* and *Jacobellis* there is a recognition by the Court that material to be obscene, must be "utterly without redeeming social value" these words are not included in the definition.

In *Memoirs v. Massachusetts*, 383 U.S. 413 (1965), however, the Supreme Court went further when it declared at 418 that in order for material to be obscene:

> "Under this (*Roth*) definition as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in tex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value."

The Fifth Circuit has not passed directly on the question before us but in the case of *Phelper v. Decker*

the Court made this comment at p. 40 on the statute before us:

> "Since the Texas Statute is devoid of any language that requires a finding that the material must have no redeeming social value it may be constitutionally suspect."

The definition of "obscene" in Article 527 does not appear to have been construed by the Texas Courts. In this circumstance we must place our own construction on the statute.

It is clear to us that the Supreme Court in *Memoirs* has added to the definition per se, of "obscene" in the *Roth* case by including in it the provision that to be "obscene" material must be "utterly without redeeming social value." Thus without such inclusion the Texas statute is unconstitutional.

As to the Plaintiff's contention concerning contemporary community standard, we assume *arguendo* that national standards are constitutionally required. See *Jacobellis v. Ohio*, *supra* at 192-195. This portion of Article 527 apparently has not been construed by the Texas courts. In our opinion Article 527 may reasonably be construed as merely rejecting "local" (i.e. less than state-wide) community standards, and thus is not constitutionally deficient.

Amicus Curiae contends that Article 527 is unconstitutional because it lacks any provision for an adversary hearing on the question of obscenity prior to seizure, citing *inter alia Marcus v. Search Warrant*, 367 U.S. 717 (1961), *Quanity of Books v. Kansas*,

378 U.S. 205 (1964), and *Freedman v. Maryland* 380 U.S. 51 (1965).

We conclude, however, that the absence of such a provision does not invalidate the statute. None of the cases cited support this proposition. In most of the cases cited the Supreme Court reversed a conviction because the *procedures* involved were inadequate. And in *Freedman v. Maryland* the statute declared unconstitutional was not a penal statute such as Article 527, but a civil statute which required that all films be submitted to a Board of Censors before being shown to the public.

As the State points out there is at least one procedure whereby Article 527 as written may be constitutionally enforced; police officers can purchase material, and prosecutions can be instituted on the basis of the purchased articles.

If, in fact, constitutionally suspect procedures are followed in enforcing Article 527, then the constitutionality of such procedures can be collaterally attacked in federal court without the necessity of exhausting state remedies. The *Dombrowski* rationale, if not the precise holding itself, would apply to this situation since First Amendment rights may be irretrievably lost by a seizure of Constitutionally protected publications. *See e.g. Poulos v. Rucker, M.D.* Ala. 1968, 288 F. Supp. 305.

We will not pass upon Plaintiff's contention that the exemption of daily and weekly but not bi-weekly newspapers from the operation of Article 527 offends the equal protection clause of the Fourteenth Amend-

ment. Since this ground of attack does not involve an allegation that the statute on its face is repugnant to the First Amendment, *Dombrowski* does not compel us to dispense with abstention and the limitation upon the exercise of federal equity jurisdiction.

In conclusion, Section 1 of Article 527 is impermissibly and unconstitutionally broad. The definition of "obscene" in Section 3 should include a requirement that the material be "utterly without redeeming social value". Plaintiff is entitled to a declaratory judgment to this effect and to injunctive relief against the enforcement of Sections 1 and 2.

Judgment will be entered in accordance with the declarations and conclusions reached herein.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

BRENT STEIN Plaintiff	)	
V	)	Civil Action 3-2951-B
CHARLES BATCHELOR, Chief of Police, City of Dallas; T. C. SNIDER, V. D. MONAGHAN, R. D. RODGERS, and HENRY WADE, District Attorney, Dallas County Defendants	)	

FINAL JUDGMENT AS TO PART OF PLAINTIFF'S CLAIM

This action came on for hearing on Plaintiff's Motion for Partial Summary Judgment before a three-judge court composed of the Hon. Sarah T. Hughes, the Hon. Irving Goldberg, and the Hon. H. O. Woodward and the issues having been duly heard and a decision having been duly rendered in an opinion filed with the Clerk on June 9, 1969.

IT IS ORDERED, ADJUDGED AND DECREED:

1. Section 1 of Article 527 of the Texas Penal Code, Acts of 1961 57th Legislature entitled "Acts involving obscene articles, objects, and materials; fines and penalties; exemption." is hereby de-

clared to be impermissibly broad and unconstitutional.

2. The definition of obscene as set forth in Section 3 of the aforesaid statute is unconstitutional because of failure of that definition to include a requirement that the material be utterly without redeeming social value.

3. Defendants are permanently enjoined from future enforcement of Sections 1 and 2 of Article 527 of the Texas Penal Code, Acts of 1961, 57th Legislature entitled "Acts involving obscene articles, objects, and materials; fines and penalties; exemptions." as against Plaintiff.

4. All claims and issues not herein determined are reserved for determination by a single judge of this court.

ENTERED this 27 day of June, 1969.

IRVING L. GOLDBERG
JUDGE, UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

SARAH T. HUGHES
JUDGE, UNITED STATES DISTRICT COURT

HALBERT O. WOODWARD
JUDGE, UNITED STATES DISTRICT COURT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, [redacted] 1970

NO. [redacted] 41

CHARLES BATCHELOR, Chief of Police, City of Dallas; T. C. SNIDER, V. D. MONAGHAN, R. D. RODGERS, and HENRY WADE, District Attorney, Dallas County,
Appellants

v.

BRENT STEIN,
Appellee

ON DIRECT APPEAL FROM THE UNITED STATE THREE-JUDGE DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

BRIEF FOR THE APPELLANTS

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

NO. 565

CHARLES BATCHELOR, Chief of Police,
City of Dallas; T. C. SNIDER,
V. D. MONAGHAN, R. D. RODGERS, and
HENRY WADE, District Attorney, Dallas County,
Appellants

v.

BRENT STEIN,
Appellee

ON DIRECT APPEAL FROM THE UNITED STATE THREE-JUDGE DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

BRIEF FOR THE APPELLANTS

OPINION BELOW

The opinion of the United States District Court for the Northern District of Texas, is reported at 300 F. Supp. 602 (1969).

JURISDICTION

The judgment below, by a three-judge court convened under authority of Sections 2281 and 2284, Title 28, U.S.C., was rendered on June 27, 1969, declaring the Texas Obscenity Statute unconstitutional in part and enjoining the enforcement of

the statute. Notice of Appeal was given on July 9, 1969. On August 27, 1969, by order of Mr. Justice Black, the time within which to docket the appeal was extended to October 1, 1969. The Appeal was thereafter timely docketed on September 8, 1969.

Jurisdiction to review the judgment below on direct appeal is conferred by Title 28, U.S.C., Sections 1253 and 2101(b). Probable jurisdiction was noted by the Court on December 8, 1969.

STATUTE INVOLVED

As noted above, the three-judge district court below held that Article 527, Texas Penal Code, was unconstitutional and restrained its enforcement. Article 527 has since been amended, but it read, in pertinent part at the time of the Court's decision as follows:

> "Art. 527. 509 Acts involving obscene articles, objects and materials; fines and penalties; exemptions
>
> "Section 1. Whoever shall knowingly photograph, act in, pose for, model for, print, sell, offer for sale, give away, exhibit, televise, publish, or offer to publish, or have in his possession or under his control, or otherwise distribute, make, display, or exhibit any obscene book, magazine, story, pamphlet, paper, writing, card, advertisement, circular, print, pictures, photograph, motion picture film, image, cast, slide, figure, instrument, statue, drawing, phonograph record, mechanical recording, or presentation, or other article which is obscene, shall be fined not more than One Thousand Dollars ($1,000) nor imprisoned more than one (1) year in the county jail or both.
>
> "Sec. 2. Whoever shall knowing offer for sale, sell, give away, exhibit, televise, or otherwise dis-

tribute, make, display, or exhibit any obscene book, magazine, story, pamphlet, paper, writing, card, advertisement, circular, print, pictures, photograph, motion picture film, image, cast, slide, figure, instrument, statue, drawing, phonograph record, mechanical recording, or presentation, or other article which is obscene, to a minor shall be fined not more than Two Thousand, Five Hundred Dollars ($2,500) nor imprisoned in the county jail more than two (2) years or both.

"Sec. 3. For purposes of this article the word 'obscene' is defined as whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests. Provided, further, for the purpose of this article, the term "contemporary community standards" shall in no case involve a territory or geographic area less than the State of Texas.

"Sec. 4. Whoever shall be convicted for the second time of a violation of this article shall be deemed guilty of a felony and shall be punished by confinement in the State penitentiary for not more than five (5) years or by a fine of not more than Ten Thousand Dollars ($10,000) or by both such fine and imprisonment.

"Sec. 5. It shall be a defense to any charges brought hereunder if such prohibited matter or act shall be regularly in use in any bona fide, religious, educational or scientific institution or the subject of a bona fide scientific investigation.

". . ."

QUESTIONS PRESENTED

The following questions are presented by this appeal:

1. Whether, as held by the court below, Section 1,

Article 527 of the Texas Penal Code is unconstitutional because of impermissible broadness?

2. Whether, as decided by the court below, the Texas obscenity statute, the said Article 527, is unconstitutional in its entirety, including Section 2 thereof, because of Section 1 mere possession of obscenity is defined as a crime as well as public and commercial dissemination, when this prohibition against mere possession is separable from the remaining prohibitions of the statute?

3. Whether Section 3 of Article 527 is unconstitutional for not containing language that requires a jury or judicial finding that the material must have no redeeming social value expressed in the terms of *Memoirs v. Massachusetts*, 383 U.S. 413 (1965)?

4. Whether, as determined by the court below, Article 527, which defines obscenity in terms of *Roth v. United States*, 354 U.S. 476 (1957), is unconstitutionally deficient in its definition of obscenity?

5. Whether, the "redeeming social value" standard defined in *Memoirs v. Massachusetts*, supra, is a defense which must be urged and proved by a defendant charged with a violation of Article 527 or is "no redeeming social value" a matter that must be pleaded and proved affirmatively by the prosecution?

6. Whether, as stated by the court below, *Memoirs v. Massachusetts*, supra, overrules in part, modifies and extends *Roth v. United States*, supra?

7. Does "having a redeeming social value" mean that such material is not "obscene" or that even obscenity is constitutionally protected if it has a "re-

deeming social value," and is the court correct in its statement that *Stanley v. Georgia,* 394 U.S. 557 (1969), overrules *Roth v. United States,* supra, in part, because some "obscenity is afforded First Amendment protection" by the *Stanley* decision?

8. Whether the "community standards" expression used in *Memoirs v. Massachusetts,* refers to the "national" community, the "local" community, or some other geographical or political community?

9. Whether the court below can properly order injunctive relief, as it did, against the peace officers of the City of Dallas and the law enforcement officials of Dallas County in this case where prosecutions were pending, and whether the court improperly interpreted *Dombrowski v. Pfister,* 380 U.S. 479 (1965), and ignored *Cameron v. Johnson,* 390 U.S. 617 (1968), in reaching the conclusion that injunctive relief would lie in the present case?

10. Whether, as decided by the court below in its opinion of June 9, 1969, this cause of action is "a civil rights case brought under the authority of 42 U.S.C., Section 1983 and 1985 by Brent Stein, individually and on behalf of the class similarly situated"?

11. What exactly is the scope of review, decision and permissible action of a three-judge federal court, to-wit: (1) does the court properly determine only whether a statute is constitutional on its face and can be constitutionally applied, or (2) should the critical determination be whether the statute is being unconstitutionally *applied* to the plaintiffs; and what is the meaning of the words used first in *Ex Parte Bransford,* 310 U.S. 354 (1940) and referred to in *Evergreen Re-*

view v. Cahn, 230 F.Supp. 498 (E.D. New York 1964); to-wit:

> "It is necessary to distinguish between a petition for injunction on the ground of the unconstitutionality of a statute as applied, which requires a three-judge court, and a petition which seeks an injunction on the ground of the unconstitutionality of the result obtained by the use of a statute which is not attached as unconstitutional. The latter petition does not require a three-judge court."

12. Was there a substantial federal question presented in this cause that would entitle the court below to rule that Article 527 is unconstitutional and/or did the action of the State of Texas in this cause merely show an "unconstitutionality of the result obtained by the use of the statute"?

STATEMENT OF THE CASE

Brent Stein, the Plaintiff below and Appellee here, published a newspaper known as the "Dallas Notes" twice monthly in Dallas, Texas. (App. 59). As noted in its masthead the paper is, or was, "a member of the Underground Press Syndicate (UPS) and Liberation News Service (LNS)." (Exhibit to Deposition of Truman C. Snider; loose copy of paper in Record on Appeal).

On October 30, 1968, Dallas police officers obtained a search warrant authorizing the search of premises where the newspaper was published. (App. 9-12). Under the warrant, officers seized a number of newspapers, material and printing paraphernalia, and some allegedly obscene photographs. (App. 12, 13). Later, on November 15, 1968, the Dallas police executed another search warrant and seized additional items related to

the publication of the paper. (App. 14-17). In neither the October 30 seizure nor the November 15 seizure was there a prior, adversary determination of obscenity. (App. 62-65, 71-74).

Two misdemeanor charges were filed against Stein charging the possession of obscene materials in violation of Article 527, Texas Penal Code, and such charges were pending at the time of the filing of this suit by Stein, during the pendency of this cause and at the time of the judgment of the court below. (App. 60). The gravamen of the charges was possession, not distribution, of obscene materials. (App. 60).

Stein instituted this action in the United States District Court for the Northern District of Texas, which, after amendment, asked for a declaratory judgment declaring Article 527 unconstitutional and praying for a permanent injunction against the enforcement of the statute by the Dallas police and by Henry Wade, the Dallas County District Attorney. (App. 1, 30-56).

A three-judge court was convened, and it is the judgment of that court, declaring Article 527 unconstitutional and restraining its enforcement, that is being appealed. (App. 75, 79, 93).

Appellants took the position below that Article 527 is constitutional on its face and may be enforced in a constitutional manner. Moreover, however defective the methods used in this particular case by the Dallas police (if defective they be), the Texas obscenity statute should not be held to be unconstitutional and its enforcement in toto be enjoined especially where Stein ignored available state procedures for presenting his claims. Appellants take the same position in this Court.

SUMMARY OF THE ARGUMENT

The court below incorrectly found that the Texas Obscenity Act was unconstitutionally overbroad because it purported to punish private possession (as condemned in *Stanley v. Georgia,* 304 U.S. 557 [1968]) as well as the distribution of obscene materials. The Texas courts, by proper judicial construction could have interpreted the statute so as to bring its terms within proper constitutional limitations and this Court has approved such limiting interpretations.

The confusion that presently exists in the defining of obscenity should be cleared up. Either a workable definition should be provided by the Court or the states should be permitted to adopt their own, possibly differing, standards. *Stanley v. Georgia* should be reconsidered so as to define the right to view obscenity in private as a right of privacy rather than a First Amendment right.

This Court should additionally lay to rest the uncertainty that now surrounds the proper geographical community that must be employed in measuring obscenity. Appellants urge that the community should be that of the several states or that the states be permitted to adopt whatever community standard they feel to be desirable.

Lastly, Appellants urge that this Court issue limiting instructions to the federal district courts governing the issuing of injunctions against state prosecutions. Jurisdiction is being assumed in far too many cases aiding to the already heavy burden of the federal courts and causing breakdowns in state law enforcement.

ARGUMENT AND AUTHORITIES

The questions heretofore set out present, Appellants feel, separate and valid issues. However, some may be more conveniently and meaningfully discussed and argued when considered together.

Questions 1 and 2

(Is Article 527 unconstitutionally overbroad because it purported to punish private possession as well as public distribution?)

1. Whether, as held by the Court below, Section 1, Article 527 of the Texas Penal Code is unconstitutional because of impermissible broadness?

2. Whether, as decided by the court below, the Texas obscenity statute, the said Article 527, is unconstitutional in its entirety, including Section 2 thereof, because, in Section 1 mere possession of obscenity is defined as a crime as well as public and commercial dissemination when this prohibition against mere possession is separable from the remaining prohibitions of the statute?

* * *

The judgment of the court below held Article 527 "to be impermissibly broad and unconstitutional." This holding was grounded in part, on *Stanley v. Georgia*, 394 U.S. 557 (1969), which held unconstitutional a statute which forbade mere private possession of obscenity.

It is true that Section 1 of Article 527 purports to make unlawful, possession of obscenity, and certainly, since Stanley, mere possession of obscene material cannot be punished and that portion of Article 527, which

seeks to enjoin private possession, is unenforceable. However, Section 1 also makes unlawful the *distribution* of obscenity, and its was the contention of Texas below that the entire section of the article should not be declared to be unconstitutional merely because a portion thereof is unenforceable.

Nevertheless, the court below, in its opinion handed down prior to judgment, held that:

> "Applying the above discussion of the scope of the *Stanley* decision to the present case, we conclude that Section 1 as a whole is overbroad in that it fails to confine its application to a context of public or commercial dissemination. . . ."
>
> "Although a number of the phrases of their normal and natural usage connote a public activity, this Court is disinclined to separately analyze each phrase appearing in Section 1 to determine if it is constitutionally viable. In our opinion the various provisions of Section 1 are too numerous and interrelated for such an approach to be meaningful. We therefore hold that the whole of Section 1 is unconstitutional for a failure to confine its application to a context of public or commercial dissemination."

This holding below, not only renders the "distribution" portion of Section 1 inoperative, and thus precludes prosecutions for distribution of obscenity in Texas (except to minors and the "minors" section was also held to be unenforceable), but more critically, the reasoning below would unquestionably strike down many obscenity statutes in other states.

Further, the reasoning (that *Stanley* requires the entire statute to be struck) ignores a part of *Stanley* wherein this Court permits judicial amendment to

criminal statutes. In footnote 7 of the Stanley opinion, this Court refers to an Ohio Statute which prohibited mere possession of obscenity and noted that the Ohio Court at first found that such a prohibition did not offend any constitutional right. Then the Supreme Court noted,

> "Shortly thereafter the Supreme Court of Ohio interpreted the Ohio Statute to require proof of 'possession and control for the purpose of circulation and exhibition'."

And *Miskin v. New York*, 383 U.S. 502, 508, 510 (1966), upheld a restrictive, statutory interpretation by the New York courts of that state's obscenity statute.

This Court has apparently then, given its approval to limiting interpretations placed on state statute by state courts so as to make the statutes comport with constitutional standards and rulings.

Moreover, this Court performed constitutional surgery on the Smith Act (18 U.S.C. §2385) in *Scales v. United States*, 367 U.S. 203 (1961) by judicially adding to the statute elements thought by the Court to be required by the Act to pass a constitutional inspection.

It is interesting to observe that certain federal statutes dealing with obscenity contain no reference or requirement that there be a public or commercial distribution of obscene materials in order to bring the distributor within the purview of the statute. Section 1461, Title 18, U.S.C., declares that obscene materials are non-mailable; the statute then declares that anyone who mails such matter is guilty of a crime without regard to any commercialism. Section 1462, Title 28, U.S.C., makes it a crime to import or transport ob-

scene material with no reference to whether or not the importation or transportation is for the private purpose or use of the transporter or importer; and to come within the statute, there is no necessity that the importation or transportation be for a commercial purpose. The constitutionality of these two statutes has not yet been successfully challenged. See *Armijo v. United States*, 384 F.2d 694 (9th Cir. 1967); Compare *Health v. United States*, 375 F.2d 541 (8 Cir. 1967) and *Cox v. United States*, 370 F.2d 563 (5 Cir. 1967).

Accordingly, whether private distributions be constitutionally protected or not, Article 527 of the Texas Penal Code should not have been declared unconstitutional merely because of the possibility that the language as literally written would seem to cover private distribution of obscene material.

Questions 3, 4, 5, 6, and 7

(The Problem of Defining Obscenity)

3. Whether Section 3 or Article 527 is unconstitutional for not containing language that requires a jury or judicial finding that the material must have no redeeming social value expressed in the terms of *Memoirs v. Massachusetts*, 383 U.S. 413 (1965)?

4. Whether, as determined by the court below, Article 527, which defines obscenity in terms of *Roth v. United States*, 354 U.S. 476 (1957), is unconstitutionally deficient in its definition of obscenity?

5. Whether, the "redeeming social value" standards defined in *Memoirs v. Massachusetts*, supra, is a defense which must be urged and proved by a defendant charged with a violation of Article 527 or is "no re-

deeming social value" a matter that must be pleaded and proved affirmatively by the prosecution?

6. Whether, as stated by the court below, *Memoirs v. Massachussets*, supra, overrules in part, modifies and extends *Roth v. United States*, supra?

7. Does having a redeeming social value mean that such material is not "obscene" or that even obscenity is constitutionally protected if it has a "redeeming social value," and is the court correct in its statement that *Stanley v. Georgia*, 394 U.S. 557 (1969), overrules *Roth v. United States*, supra, in part, because some "obscenity is afforded First Amendment protection" by the *Stanley* decision?

* * *

Questions 3 through 7 are interwoven in that they all deal with the question of whether *Roth v. United States*, supra, is still alive and viable. The Court below determined that *Roth* has expired and that the portion of Article 527 that defined obscenity in the terms of *Roth* was unconstitutionally deficient.

This determination that *Roth* was dead was grounded first on the premises that *Memoirs v. Massachusetts*, supra, amended and added to the constitutional definition of obscenity as prescribed by *Roth*.

Second, the Court below reasoned from *Stanley v. Georgia*, supra, that that portion of *Roth*, which held that obscenity was not constitutionally protected, was overruled by *Stanley* which decision apparently holds that some obscenity, when privately possessed, is, in fact and law, constitutionally sanctioned.

The decision by the court below, that *Roth* has been

overruled or modified by *Memoirs* and *Stanley*, raises serious questions that require ultimate resolution by this Court. This is especially true since *Roth* has been the only case where a majority of the Supreme Court concurred on an obscenity test.

In *Roth* the Court said (354 U.S. at pages 483-485):

> "The unconditional phrasing of the First Amendment was not intended to protect every utterance. . . . All ideas having even the slightest redeeming social importance . . . have the full protection of the guarantee. . . . But implicit in the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason is mirrored in the universal judgment that obscenity should be restrained, reflected in the international agreement of over 50 nations, in the obscenity laws of all 48 states, and in the 20 obscenity laws enacted by the Congress from 1842 and 1956. This is the same judgment expressed by this court in Chaplinsky v. New Hampshire, 315 U.S. 568, 571-572: 'There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene. . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . .'"

The Court continued at page 485:

> "We hold that obscenity is not within the area of constitutionally protected speech or press."

Finally at page 489, the Court held the test of obscenity is:

"Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest."

As earlier indicated the three-judge court below found that *Memoirs* has added to the definition of "obscene" in the *Roth* case by including in it the provision that to be "obscene" material must be "utterly without redeeming social value." Thus, without such inclusion the Texas statute is unconstitutional.

The portion of *Memoirs* referred by the Court above is the following expression (383 U.S. at 418):

"Under this (*Roth*) definition as elaborated in subsequent cases, three elements must coalesce; it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value."

The "(a)" part of the Memoirs, quotation in the *Roth* definition of obscenity is contained in Article 527, that is, "(a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex."

The "(b)" part of the *Memoirs* recital, that is, "(b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters," apparently comes from *Manual Enterprises v. Day*, 370 U.S. 478 (1962) at page 486 of the Court's opinion by Justices Harlan and Stewart. Only these two justices men-

tioned "patent offensiveness" and no majority of the Court agreed on any opinion.

However, the absence of the word "patently offensive" in the Texas statute was not found to be defective by the Court below.

Rather, the Court below found that the absence of any language requiring a finding that the alleged obscenity must be "utterly without redeeming social value," the "c" portion of the *Memoirs* quotation, rendered the Texas statute unconstitutional.

The "utterly without social value" expression seemingly made its appearance in *Jacobellis v. Ohio*, 378 U.S. 184 (1963) (although overtones of this view were noted in *Roth*), wherein Justice Brennan observed at page 191 of the Court's opinion:

> "... obscenity is excluded from constitutional protection only because it is 'utterly without redeeming social importance. ...'"

Only Justices Brennan and Goldberg concurred in the opinion, and Justice Brennan further stated at page 191:

> "recognizing that the test for obscenity (in *Roth*) ... is not perfect, we think any substitute would raise equally difficult problems, and we therefore adhere to that standard."

Moreover, in a dissenting opinion in *Jacobellis*, Chief Justice Warren, joined by Justice Clark, said (378 U.S. at 200):

> "For all the sound and fury that the Roth Test has generated, it has not been proven unsound, and

I believe that we should try to live with it—at least until a more satisfactory definition is evolved. . . ."

A definite test of obscenity is needed with a judicial determination being made by this Court as to whether measuring obscenity by *Roth* is still constitutionally valid or whether *Memoirs* is the new standard. Certainly, the decision in *Memoirs* does not illuminate or solve the problem. Only Justices Brennan and Fortas and Chief Justice Warren agreed on the Court's opinion reciting the necessity of three elements coalescing in obscenity cases, to-wit, that:

(a) The dominant theme of the material must appeal to the prurient interest in sex (Roth).

(b) The material be patently offensive, and

(c) The material be utterly without redeeming social value.

Indeed, the opinion in *Memoirs*, 383 at 418, points out that the question, which was before the state courts in that case, was whether or not the subject book satisfied "the test of obscenity *established in Roth v. United States.* . . ." (Emphasis added)

Justice White dissented in Memoirs and noted at page 461 of the decision that:

> "To say that material within the *Roth* definition of obscenity is nevertheless not obscene if it has some redeeming social value is to reject one of the basic propositions of the *Roth* case—that such material is not protected because it is inherently and utterly without social value." (Emphasis that of Justice White.)

And Justice Clark, in another dissenting opinion in *Memoirs* called the social value test "novel" (383 U.S.

443), noting that only three justices adhered to it, and observing that such test "rejects the basic holding of *Roth*" (383 U.S. 441).

Later, in 1967, the Supreme Court, in *Redrup v. New York,* 386 U.S. 773, by per curiam opinion, noted that the three element test of *Memoirs* is one espoused by only certain justices in the *Memoirs* case. *Redrup* pointedly did not embrace the *Memoirs* test as that of the Court.

Memoirs poses another question. Under its test, if the dominant theme appeals to the prurient interest in sex and the material is patently offensive, is the material "obscene" with the material being afforded protection if it has some redeeming social value. Or if material has redeeming social value, is it, then, by *Memoirs* definition not obscene regardless of what the material depicts. If the first view is accepted, then some obscenity (that with a redeeming social value) is protected and *Roth* is to that extent overruled.

Certainly, *Stanley v. Georgia,* in deciding that private possession of obscenity is constitutionally protected under the First Amendment would seem to partially overrule *Roth's* holding that obscenity is not so protected.

Accordingly the opinion and judgment of the court below taken in conjunction with decisions of this Court initially present the following problems for resolution in this case.

(1) Is the *Roth* test of obscenity still the law of the land?

(2) If so, may an accused show "a redeeming social

value" as a defense to a charge of distributing alleged obscene materials?

(3) Is the "test" of obscenity now to be the three-pronged "test" noted in *Memoirs*?

(4) If so, must the prosecution prove all elements of the *Memoirs* "test," or is the "redeeming social value" value" element a defense to the charges which must be shown by the defendant?

(5) If the *Memoirs* test is used, in whatever form decreed, does a finding of "a redeeming social value" mean that the material is not obscene or that even obscene material is protected when it has a redeeming social value?

(6) Does *"Stanley v. Georgia"* overrule that part of *Roth* which held that obscenity is not protected by the First Amendment to the Constitution of the United States because private possession of obscenity cannot be prescribed or punished?

The determination in *Stanley v. Georgia*, that the First Amendment guarantees the right of private possession of obscene material, gives rise to an even more profound problems. If a citizen may read obscenity in his own home, how does he obtain the materials? By borrowing, by stealing, or by purchase? If it is permissible to read at home, is it permissible to buy? If obscene materials can be purchased for reading in the home, is not the commercial selling of pornography constitutionally protected as well?

One futher logical extension of *Stanley* should be considered. If obscenity is now (at least in part) within the protection of the First Amendment, does this

mean that one of the areas of legitimate regulation of distribution of obscenity as mentioned by *Redrup v. New York*, 386 U.S. 767, 769 (1969), has been modified or extinguished, i.e., the "pandering" activity by a distributor which intrudes upon the privacy of the members of the public. Now, if obscenity is First Amendment protected, its distribution should logically be protected and this would include advertising and intrusions upon sensibilities and privacy. The ideas protected by the Constitution should, logically, be given the opportunity of consideration and acceptance by the public and this would seem to require protecting the pandering and purveying of these ideas.

Does *Stanley* then, really mean that the states (and the federal government) may only regulate the distribution of obscene materials to children—that all other regulation is dead? Does it mean the football arenas of the country may be used to hold sex circuses during the off season?

Appellants say that *Stanley* does *not* mean that regulation of obscenity is dead. Appellants further say that *Stanley* and its predecessor cases *must* be so interpreted as to permit the regulation of obscenity or our reeling society will suffer still another damaging blow. The day is drawing closer when repeated, punishing blows to the fabric of our society may produce the demise of our country.

Societies are formed by people to promote mutual protection and group cooperation in the fight for survival. Society must have rules which are imposed by the majority upon its members or the individual member may either contribute nothing to the society or be

an actual, positive detriment to it. Along with the regulations set up by society, it is desirable, as is done in this country, to permit the individual an area where he may disagree with the established practices and vocalize his disagreement or his suggestions for change. However, dissent and disagreement must in some wise be curbed at some point or there would never be concerted action, never be mutual enterprise, and so finally, no society. With the death of society, all individual rights which were granted and protected by the society would die. And perhaps the entire people that made up the society would succumb.

Today, the people of our society have never been so free. They have never had so many individual rights diligently guarded by so many people and institutions. And also today, never have there been so much discontent, unhappiness, turmoil and actual violence. Never since the frontier days have there been so much danger to the members of this society as they walk the streets of this country and pursue their daily occupations.

Individual rights are good and desirable and free speech is certainly one of the most important of these individual rights. But instead of extending the freedom of speech and expression at the present time, some consideration must be given to the curbing and curtailing of this right and to the rights of a majority of the citizens. In many areas it is impossible to hold political conventions because the dissent insists on being heard at all times without giving other points of view the chance to be heard and considered. Church services have suffered from an overdose of freedom of speech and in some places and in some churches it is difficult if not impossible to hold an orderly church

service. It has become increasngly difficult in many schools to conduct classes and it would be indeed ironic to find that the exercise of the right of freedom of speech destroyed education and the schools. It has even become difficult to conduct judicial business. Witness the trial of the Chicago Eight where the free expression of ideas by a defendant destroyed the trial in progress and has tarnished the entire judicial processes of this country.

The dangers facing our society must be recognized and the right of free speech must be re-examined. Where the exercise of free expression of ideas threatens the existence of the society (which guarantees free speech), free speech may and should be proscribed.

In the case of obscenity, it is difficult to find any one who will affirmatively maintain that the ideas expressed therein have any social value. This Court should re-examine *Stanley v. Georgia* and if it is felt desirable to permit citizens to read and view obscenity in the home, the decision should be couched in terms of a right of privacy—not in terms of First Amendment free speech. Then, this Court should reaffirm the holding in *Roth* that obscenity is not protected by the First Amendment and either provide a workable standard against which to measure pornography, or more preferably, permit the several states latitude in formulating their own definitions as suggested by Justice Harlan in *Roth*, 354 U.S. at 505.

Question 8

(The Geographical Standard
For Measuring Obscenity)

8. Whether the "community standards" expression

used in *Memoirs v. Massachusetts,* refers to the national community, or some other geographical or political community?

* * *

The Texas obscenity statute, Article 527, as it was written at the time of the decision in this case contained the following language:

> "Provided, further, for the purpose of this article, the term 'contemporary community standards' shall in no case involve a territory or geographic area less than the State of Texas."

This language was attacked by Stein below as being unconstitutional, Stein claiming that the decisions of this Court required that a national community be the geographical area for determining whether obscene materials appealed to the prurient interest of the people in such community. Stein cited *Jacobellis v. Ohio,* supra, in support of his contention.

While the three-judge court below did not hold the Texas statute unconstitutional for failing to require the national community, the court wrote in its opinion that it assumed "national standards are constitutionally required."

This question, whether a local, state, national or some other geographical community is proper, should be considered and decided by this Court even though the resolution of this issue was not determinative of the decision below.

Jacobellis v. Ohio, supra, cited by the court below as its reason for believing that a national standard or community is required, certainly gives no answer to the problem. Notice should again be made that there

was really no majority opinion in *Jacobellis*. Justice Brennan wrote the opinion that appears first in the decision, joined only by Justice Goldberg; Justice Goldberg wrote a separate concurring opinion in which he stated he agreed with everything Brennan had written; Justice White concurred in the judgment of reversal only; Justices Black and Douglas concurred in the reversal for the reason that they believed that any motion picture has full First Amendment protection; Justice Steward stated that only hard-core pornography can be constitutionally limited, and that the subject matter of the case was not hard-core pornography; Chief Justice Warren, joined by Justice Clark, wrote a dissenting opinion.

In the opinion of Justice Brennan, concurred in by Justice Goldberg, it was said at 378 U.S., page 195:

> ". . . the constitutionality status of an allegedly obscene work must be determined on the basis of a national standard. It is, after all, a national constitution we are expounding."

Justice Warren, joined by Justice Clark, observed (378 U.S. at 200):

> "It is my belief that when the Court said in *Roth* that obscenity is to be defined by reference to 'community standards,' it meant community standards not a national standard, as is sometimes argued. I believe that there is no provable 'national standard,' and perhaps there should be none."

Therefore, *Jacobellis* would indicate that two of the Justices that decided the case felt that it was a national standard by which obscenity must be measured, while two other Justices felt that the question of obscenity

must be determined by use of local community standards.

Appellant's, however, suggest a state standard or a rule that would permit the states to elect the geographical area in which to measure obscenity.

Using a national standard would be almost unworkable. What juror or what witness would have the experience to determine that "Book A" appeals to the prurient interest of the residents of Maine, Florida, Arizona, Washington, Alaska, and Hawaii. And that the book is patently offensive to people in Massachusetts, Mississippi, Illinois, Texas, Montana and California. Or that it has no redeeming social value in any of these and the other 50 states.

The problem would not be so acute if the courts accorded to jurors the same competency and standards ascribed to and used by the courts. Judges, regardless of geographical background or social training have no difficulty in examining material without the aid of expert testimony and determining whether the material is obscene.

However, it is really no satisfactory answer to credit or imbue local jurors with national experience in sexual matters and require them to use a national standard in passing on obscenity.

Perhaps, the best answer may be found in the opinion of Justice Harlan in *Roth v. United States* wherein he speaks of the desirability of the several states dealing with obscenity in different ways. At page 505, Justice Harlan writes:

"It has often been said that one of the greater

strengths of our federal system is that we have, in the forty-eight States, forty-eight experimental social laboratories. 'State statutory law reflects predominantly this capacity of a legislature to introduce novel techniques of social control. The federal system has the immense advantage of providing forty-eight separate centers for such experimentation.' Different States will have different attitudes toward the same work of literature. The same book which is freely read in one State might be classed as obscene in another. And it seems to me that no overwhelming danger to our freedom to experiment and to gratify our tastes in literature is likely to result from the suppression of a borderline book in one of the States, so long as there is no uniform nation-wide suppression of the book, and so long as other States are free to experiment with the same or bolder books."

Questions 9, 10, 11, and 12

(The Proper Scope of Action by a Three-Judge Court)

9. Whether the court below can properly order injunctive relief, as it did, against the peace officers of the City of Dallas and the law enforcement officials of Dallas County in this case where prosecutions were pending, and whether the court improperly interpreted *Dombrowski v. Pfister*, 380 U.S. 479 (1965), and ignored *Cameron v. Johnson*, 390 U.S. 617 (1968), in reaching the conclusion that injunctive relief would lie in the present case?

10. Whether, as decided by the court below in its opinion of June 9, 1969, this cause of action is "a civil rights case brought under this authority of 42 U.S.C., Section 1983 and 1985 by Brent Stein, individually and on behalf of the class similarly situated"?

11. What exactly is the scope of review, decision and permissible action of a three-judge federal court, to-wit: (1) does the court properly determine only whether a statute is constitutional on its face and can be constitutionally applied, or (2) should the critical determination be whether the statute is being unconstitutionally *applied* to the plaintiffs; and what is the meaning of the words used first in *Ex Parte Bransford*, 310 U.S. 354 (1940) and referred to in *Evergreen Review v. Cahn*, 230 F.Supp. 498 (E.D. New York 1964); to-wit:

> "It is necessary to distinguish between a petition for injunction on the ground of the unconstitutionality of a statute as applied, which requires a three-judge court, and a petition which seeks an injunction on the ground of the unconstitutionality of the result obtained by the use of a statute which is not attacked as unconstitutional. The latter petition does not require a three-judge court."

12. Was there a substantial federal question presented in this cause that would entitled the court below to rule that Article 527 is unconstitutional and/or did the action of the State of Texas in this cause merely show an "unconstitutionality of the result obtained by the use of the statute"?

* * *

The foregoing questions, questions 9 through 12, are all related to the propriety of *forming a three-judge* federal court and the scope of permissible action by the court after its formation.

Assuming arguendo that the three-judge court was properly constituted in this case, Appellants urge here, as they did below, that no injunctive relief should have

been issued in this case. It is the state's contention that an injunction, as decreed by the court below, was improper under the principles and doctrines of equity and federalism. *Cameron v. Johnson,* 390 U.S. 617, 618 (1968); *Dombrowski v. Pfister,* 380 U.S. 479, 483-485 (1965).

The Court below, however, relied on *Dombrowski v. Pfister,* supra, as authority for entering the arena of state prosecution at the early stages. This reliance apparently ignored the decision of this Court in *Cameron v. Johnson,* supra.

While the state prosecutions here charged possession of obscene matter and would hence be ineffective under the holding of *Stanley v. Georgia,* supra, Stein did not attempt to have the state courts pass on the validity of the charges prior to filing suit in federal court and accordingly the courts of Texas had no opportunity to apply Stanley to the facts of the pending charges against Stein. The determination of the applicability of *Stanley v. Georgia,* supra, as well as the validity of the Texas obscenity statute could have been tested prior to trial by habeas corpus in the Texas Court of Criminal Appeals. See *Ex Parte Sandford,* 289 S.W. 2d 776 (Tex. Crim. 1956).

It should also be noted that should allegedly obscene items be seized under a search warrant as was done here, Articles 18.25 and 18.26 of the Texas Code of Criminal Procedure specifically provide for a judicial inquiry into the grounds for holding the defendant and the property in question. Under these provisions the magistrate is enjoined to discharge the defendant and restore the property taken from him where he finds

that there were not good grounds for the issuance of the warrant.

There was not a threat of continued state action here after the state courts had quashed arrest warrants and suppressed evidence, as was done in *Dombrowski*. Indeed, the Texas Courts did not have the opportunity to pass on Stein's contentions. Appellant submits that Stein could, and should, have sought the return of the materials in question and a dismissal of the charges in the state courts of Texas, urging there, the arguments and authorities presented to the court below. See *Cameron v. Johnson*, supra, 390 U.S. at page 618.

The contentions of Stein with regard to the proper definition of obscenity, as well as all his other contentions, made in the federal court below, presuppose that state courts will ignore the case law of the Supreme Court and try the cases erroneously. It cannot be presumed that state courts will not accord defendants their full federal and state constitutional rights in state court trials. *Walker v. Birmingham*, 388 U.S. 307, 319 (1967); *Harris v. N.A.A.C.P.*, 360 U.S. 167 (1959). The mere possibility of an erroneous application of constitutional standards will not justify federal courts' disrupting state proceedings. *Cameron v. Johnson*, supra; *Dombrowski v. Pfister*, supra. The state courts, presumably, would have construed Article 527 and applied it in keeping with constitutional principles, and the court below should have assumed that the state courts will do so. *Cameron v. Johnson*, supra; *Nesmith v. Alford*, 318 F.2d 110, 319 F.2d 859 (5th Cir., 1963), cert. denied in *Sullivan v. Nesmith*, 375 U.S. 975 (1964).

In *Brooks v. Briley*, 274 F.Supp. 538 (1967), af-

firmed 391 U.S. 361 (1968), a three-judge court of the Middle District of Tennessee said:

> "In our dual system of government we have rejected the concept of a national police force. Instead, we have committed to state and municipal authorities the primary responsibility for police protection and for the maintenance of law and order. Lacking such responsibility, the federal authority should be allowed to intrude itself through the Federal Courts into the law enforcement duties and activities of the states only when the necessity for such intrusions is clear and unmistakable. . . ."

See also *Cameron v. Johnson*, supra; and *Zwicker v. Boll*, 270 F.Supp. 133 (Three-Judge Court, W.D. Wisconsin 1967), affirmed 391 U.S. 353 (1968).

As Justice Black observed in his concurring opinion in *Byrne v. Karalexis*, —— U.S. ——, 38 L.W. 3221 (December 15, 1969),

> "One of the fundamental aspects of our federal constitutional system requires that our federal courts refrain from interferring in pending state criminal prosecutions except in highly unusual and very limited circumstances."

It is submitted that injunctive relief was not proper under the facts and circumstances as revealed below especially since no attempt was made to secure rulings on the questions presented in the federal proceeding in the courts of Texas.

A companion question is raised by the language of the court below at the beginning of its opinion rendered on June 9, 1969, prior to the final judgment, the court stating,

> "This case involves the constitutionality of Article

527 of the Texas Penal Code, . . . It is a civil rights case brought under authority of 42 U.S.C. section 1983 and 1985 by Brent Stein, individually and on behalf of the class similarly situated."

Arguendo, the facts as revealed in the Court below may have shown an illegal search and seizure and illegal prosecutions for the *possession* of obscenity, but there was no showing, Appellants submit, that the agents of the State of Texas deliberately sought to harass Stein except, perhaps, through zealous enforcement of a then valid Texas obscenity statute.

If this case can be said to fit within the provisions of 28 U.S.C. §1343(3) (4) then almost surely it can be stated that 28 U.S.C., Sections 2281 and 2284 apply. In other words, the plaintiff below could be said to have a right guaranteed by the Constitution of the United States denied because of an unconstitutional Texas statute; and to obtain injunctive relief on this ground, a three-judge district court would be required to determine the issue of unconstitutionality and grant any appropriate injunctive relief.

However, in the guise of a civil rights suit under 42 U.S.C., Sections 1983 and 1985 as determined by the court below (Section 1985 is especially inappropriate), some authority seems to support the proposition that a three-judge federal court is not necessary to order injunctive relief where a state statute is found to be unconstitutional and that one federal judge can issue injunctive relief. See *Holmes v. Danner,* 191 F.Supp. 394 (D.C. Ga. 1960); and *Sheldon v. Fannin,* 221 F. Supp. 766 (D.C. Ariz. 1963).

This gray area involving the proper applicability of

28 U.S.C., Sections 2281 and 2284, in cases where a civil rights violation is charged and relief is grounded upon an unconstitutional state statute, should be eliminated by this Court. It is arguable that any police harassment here was engendered only because of the existence of Article 527 and for the courts to enjoin the operation of Article 527 there must be a determination made, as was done below, that the statute is unconstitutional. Injunctive relief can then only be proper when ordered by a three-judge district court. It follows in this context, or seems to Appellants to follow, that there is no basis for the statement of the court below that this is a civil rights case arising under 42 U.S.C., Sections 1983 and 1985, when the Court went on to determine the unconstitutionality of Article 527.

It is urged that this Court should clear up the confusion which apparently exists in the opinion of the court below on the interrelation of the civil rights provisions of Title 42 and Title 28 and the proper application of each in a case such as is presented here.

There is an additional problem inherent in the case below and in all three-judge federal court cases. Is the scope of the court's inquiry merely to be a determination as to whether the challenged statute is constitutional on its face and is capable of constitutional application by the state authorities? See the statement in the opinion below wherein the Court states at page 6 of the opinion, "Our sole concern is the determination of whether the statute is constitutionally defective on its face," and *Dombrowski v. Pfister,* supra, 380 U.S. at page 491, where the Court speaks of a statute being "attacked on its face." Or should the inquiry be expanded or limited to a determination of whether the

statute is being unconstitutionally applied? See *Ex Parte Bransford,* supra.

The proper boundaries by a three-judge federal court is of critical, nationwide importance in our federal system. Should such a court only decide if a state statute is constitutional on its face or should its inquiry be directed to a consideration of whether the statute, as applied, is unconstitutional; and should this latter inquiry, if proper, be directed to determining whether the statute is *usually* given constitutional application by state authorities or whether the court should look only to the particular situation presented in reaching a decision on constitutional application.

Here, arguendo, Appellant will concede that the procedures used in enforcing Articles 527 were not constitutionally permissible and that, possibly, an unconstitutional result, as defined by *Ex Parte Bransford,* supra, was obtained by the use of the statute. But again, should these circumstances authorize the empaneling of a three-judge federal court? Appellants submit that the permissible scope of action by a three-judge federal court is not now clearly defined and that this question should be answered by the Supreme Court in order to provide guidelines in future three-judge court controversies involving constitutionality of state statutes.

Too many cases are being taken by three-judge courts. Some limiting instructions need to be propounded. Certainly where there is an adequate state remedy, no jurisdiction should be taken.

CONCLUSION

The three-judge federal court below incorrectly held the Texas obscenity statute, Article 527, to be unconsti-

tutional for the reasons given above. Furthermore, whether Article 527 be constitutional or unconstitutional, the court below erroneously, under the principles of federalism, enjoined state officials from enforcing the statute.

It is submitted that the judgment of the court below should be reversed.

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CERTIFICATE OF SERVICE

I, Lonny F. Zwiener, a member of the Bar of the Supreme Court of the United States, do hereby certify that a copy of the foregoing Brief of the Appellants has been served on counsel for the Appellee by depositing the same in the United States Mail, postage prepaid, addressed to Mr. David R. Richards, 205 Texas AFL-CIO Building, 308 West 11th Street, Austin, Texas 78701, this the ____ day of _____, 1969.

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SUPREME COURT, U. S.

FEB 21 1970

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IN THE

Supreme Court of the United States

October Term, [redacted] 1970

No. [redacted] 41

CHARLES BATCHELOR, Chief of Police, City of Dallas; T. C. SNIDER, V. D. MONAGHAN, R. D. RODGERS, and HENRY WADE, District Attorney, Dallas County,

Appellants,

vs.

BRENT STEIN,

Appellee.

On Appeal From the District Court for the Northern District of Texas.

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IN THE

Supreme Court of the United States

October Term, 1969
No. 565

CHARLES BATCHELOR, Chief of Police, City of Dallas; T. C. SNIDER, V. D. MONAGHAN, R. D. RODGERS, and HENRY WADE, District Attorney, Dallas County,
Appellants,

vs.

BRENT STEIN,
Appellee.

On Appeal From the District Court for the Northern District of Texas.

Mel S. Friedman, Esq. and Stanley Fleishman, Esq. as Amici Curiae in Support of Appellee.

Mel S. Friedman is a member of the bar of the State of Texas. In the court below, he appeared as *amicus curiae* on behalf of appellee and argued the substantial constitutional questions which are presented on the appeal herein. See, *Stein v. Batchelor,* 300 F. Supp. 602, 603. He has also been involved in litigation in both federal and state courts involving the same issues.

In accordance with the Rules of the Court, consent to the filing of a brief *amicus curiae* has been obtained

from all parties to the case and is being filed simultaneously with the brief herein with the Clerk of this Court.

Mr. Friedman has associated with him on this brief Stanley Fleishman, a member of the bar of this Court and of the bar of the State of California. Mr. Fleishman has argued a number of cases in the obscenity area before this Court. See, *Alberts v. California*, 354 U.S. 476; *Smith v. California*, 361 U.S. 147; *Quantity of Copies of Books v. Kansas*, 378 U.S. 205; *Redrup v. New York*, 380 U.S. 767. He is presently involved in litigation, both criminal and civil, in federal and state courts in California and other states, where the same constitutional questions presented on this appeal are also directly raised.

Amici desire to bring to the attention of the Court considerations of transcending importance to the case. The development of constitutional standards for judging obscenity require, in the first instance, a brief historical survey in order to properly appraise the correctness of the decision below. Amici believe this is necessary, in the light of the complexity of the problem involved in defining obscenity, and in applying the definition in particular cases.[1] In addition, amici also believe

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[1] "The subject of obscenity has produced a variety of views among the members of the Court unmatched in any other course of constitutional adjudication . . . the upshot of all this divergence of viewpoint is that anyone who undertakes to examine the Court's decisions since *Roth* which have held particular material obscene or not obscene would find himself in utter bewilderment." Justice Harlan in *Ginsberg v. New York, Interstate Cir-*

that it will be helpful to the Court to bring to its attention the growing legal trends toward the abolition of criminal sanctions against private sexual conduct, in the light of changing social and cultural standards. Finally, the importance of the experience of other countries which have abolished all legal prohibitions against the publication, sale and distribution of obscene material to adults deserve consideration on the appeal herein. Amici have attached to this brief as Appendix A a report by the Danish Ministry of Justice on the recent changes in the Danish Criminal Code with respect to the dissemination to adults of allegedly obscene written and pictorial material.

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cuit, Inc. v. City of Dallas, United Artists Corp. v. City of Dallas, 390 U.S. 629, 676, 704-707, concurring and dissenting opinion. See also, Justice Black in *Ginzburg v. United States*, 383 U.S. 463, 478-481; Justice Douglas in *Ginzburg v. United States*, 383 U.S. at 483; Justice Harlan in *Memoirs v. Massachusetts*, 383 U.S. 413, 455-456; Justice Stewart in *Jacobellis v. Ohio*, 378 U.S. 184, 197; Chief Justice Warren in *Jacobellis v. Ohio*, 378 U.S. at 200-201; *Per curiam* in *Redrup v. New York*, 386 U.S. 767, 770-771. The law of obscenity has been described as "a constitutional disaster area". Magrath, "The Obscenity Cases: Grapes of Roth", in Supreme Court Review 7, 56 (1966).

ARGUMENT.

I.

A State Statute Which Purports to Punish the Dissemination of Obscene Material to Adults Violates the Free Speech and Press, Due Process, and Equal Protection Provisions of the First and Fourteenth Amendments to the United States Constitution.

A. *Roth v. United States* [*Alberts v. California*], 354 U.S. 476, held that the protective guarantees of the First Amendment were available to all ideas having even "the slightest redeeming social importance." Nevertheless, obscenity was deemed beyond the pale of constitutional protection, a conclusion bottomed on an historial view that obscenity is so low in the hierarchal scale of expression as to warrant exclusion from the impregnable area of the First Amendment. The prior standard of judging obscenity by the effect of an isolated excerpt upon particularly susceptible persons was rejected, and in place of the *Hicklin* test there was substituted the test: whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest. Since obscenity implicates First Amendment questions, ceaseless vigilance was essential to prevent erosion of free speech and press guarantees by the Congress or by the States; the door barring intrusion was to be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests.

The vagueness of the standards and criteria for judging obscenity and the difficulty of applying such tests to particular material involved in specific cases

were plainly manifested in the uniform reversals of lower court rulings by this Court following *Roth*.[2] In *Jacobellis v. Ohio*, 378 U.S. 184, and *Memoirs v. Massachusetts*, 383 U.S. 413, the standards for judging obscenity were elaborated to include the three-pronged test: contemporary community standards, prurient interest, and social importance. The three criteria were to be applied independently; the social value of the material was neither to be weighed against nor cancelled by its prurient appeal or patent offensiveness.

The decisions in *Ginzburg v. United States*, 383 U.S. 463, and *Mishkin v. New York*, 383 U.S. 502, were, it is submitted, a recognition by the Court of the complex problem of establishing a definition of obscenity which could be reconciled with the First Amendment. The judicially improvised doctrine of "pandering" was itself inherently vague and, in operation and effect, a further deterrent to freedom of expression. Nevertheless, the invocation of the "variable obscenity" approach and the emphasis on the conduct of the accused, rather than the nature of the material, presaged a changing outlook by the Court, with respect to an appropriate balancing of the individual and societal interest in First Amendment freedoms of speech and press with those narrow interests which the State might appropriately protect.

In *Redrup v. New York*, 386 U.S. 767, the Court concluded that the distribution of the material therein involved was protected by the First and Fourteenth

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[2]See the partial recital of cases contained in the opinion of Justice Harlan, concurring and dissenting, in *Ginsberg v. New York*, 390 U.S. 676, 704-707, fn. 1-11. See also, Katz, "Free Discussion v. Final Decision: Moral and Artistic Controversy and the *Tropic of Cancer* Trials", in 79 *Yale L.J.* 209 (1969).

Amendments from governmental suppression, "whether criminal or civil, *in personam* or *in rem*" (386 U.S. at 770). The difficulty which members of the Court were finding in squaring the standards for judging obscenity with the constitutional requirements of the First Amendment were candidly delineated. In holding that the lower court judgments could not stand under any particular view, the *per curiam* opinion of the Court added the following significant statement:

> "In none of the cases was there a claim that the statute in question reflected a specific and limited state concern for juveniles. See Prince v. Commonwealth of Massachusetts, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645; cf. Butler v. State of Michigan, 352 U.W. 380, 77 S.Ct. 524, 1 L.Ed.2d 412. Nor none was there any suggestion of an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it. Cf. Breard v. City of Alexandria, 341 U.S. 622, 71 S.Ct. 920, 95 L.Ed. 1233; Public Utilities Comm'n of District of Columbia v. Pollak, 343 U.S. 451, 72 S.Ct. 813, 96 L.Ed. 1068. And in none was there evidence of the sort of 'pandering' which the Court found significant in Ginzburg v. United States, 383 U.S. 463, 86 S.Ct. 942, 16 L.Ed.2d 31." (386 U.S. at 770.)

Redrup, therefore, and the multifold *per curiam* reversals thereafter based on *Redrup*, indicated that adults ordinarily could not be deprived of material dealing with sex unless one of the aforestated countervailing interests were present to justify the State's intervention in the area. Absent a case dealing solely with mi-

nors or with material forced upon the privacy of an individual who is expressly unwilling to receive such material, *Redrup* pointed in the direction of freedom for adults to receive or purchase any material dealing with sex or nudity, in the light of the guarantees of the First Amendment.

There was a basic twofold significance to the decision of the Court in *Stanley v. Georgia,* 394 U.S. 557. It was a recognition, in the first place, that obscenity is within the First Amendment's protection of speech and press; a rejection of the notion that protection of freedom of expression depends upon some arbitrarily imposed scale of values. In the second place, the added dimensions of the right to privacy and liberty of circulation, in the *Stanley* opinion, sharpened the line between protected expression and conduct which the State may restrict. See, Note, "The Supreme Court, 1968 Term", in 83 *Harvard L.R.* 147-154 (1969).

In *Stanley,* the State had argued that since "obscenity" cannot be deemed to be within the area of constitutionally protected speech under *Roth,* it followed that the State was "free to deal with the possession of such material in much the same manner as it dealt with other contraband found in the possession of its citizens." The Court replied that the case could not be decided "simply by citing *Roth*". The mere categorization of material as "obscene" was insufficient justification for "a drastic invasion of personal liberties guaranteed by the First and Fourteenth Amendments". The State did not have the right to control "the moral content of a person's thought", nor was it relevant that the material involved was devoid of ideological content. The line between the transmission of ideas and

mere entertainment was too elusive for the Court to draw. In the context of private consumption of ideas and information, the possession of obscene material could not be prohibited merely on the theory that it might lead to antisocial conduct. *Roth*, the Court stated, remains viable with respect to public distribution of obscene materials only where the State can establish justification for intervention, as in the case of dissemination to minors or unwarranted intrusion upon the privacy or sensibilities of the public.

The opinion in *Stanley* reflects a return to the operational safeguards for all First Amendment freedoms. The decisions of this Court make clear that when governmental regulation of action within the reach of the First Amendment is challenged, two demonstrations by the State become essential to its validity. The first is a clear showing that the burden placed upon the exercise of freedom of speech is justified by a compelling state interest in the regulation of a subject within the State's constitutional power to regulate, and the second is a showing that no alternative forms of regulation are available to protect that interest without infringing upon First Amendment rights. See, *Talley v. California*, 362 U.S. 60; *NAACP v. Alabama*, 357 U.S. 449; *Sweezy v. New Hampshire*, 354 U.S. 234. In *Stanley*, the sole countervailing interests which the Court found justifiable were the protection of minors and the protection of those unwilling persons upon whom the material was obtrusively forced.

Stanley emphasizes the right to individuals "to receive information and ideas". The right to possess obscene material for private use was premised on the right to receive information, ideas and entertainment.

Liberty of circulation was brigaded with freedom to possess obscene material. See, *Lovell v. City of Griffin*, 303 U.S. 444, 452. The Court recognized that freedom of speech and press embraces "the right to distribute literature" and "the right to receive it", pointing to *Martin v. City of Struthers*, 319 U.S. 141 and *Griswold v. Connecticut*, 381 U.S. 479.

If one has the constitutional right to possess "obscene" material, and the right to receive such obscene material, it follows, it is submitted, that governmental limitation upon the sale and distribution of such material would also run afoul of the guarantees of the First Amendment. Individuals who have a right to possess and receive obscene material cannot be required to obtain such material illegally. The State should not place citizens in the position of surreptitiously obtaining material which they are lawfully entitled to possess, and such an unfair burden would itself be a limitation upon the free circulation of protected material and inhibit persons from possessing or receiving constitutionally protected material. Such "chilling effect" upon the exercise of freedoms of speech and press is inconsistent with the guarantees of the Constitution.

In *Lamont v. Postmaster General*, 381 U.S. 301, it was stressed that access to publications is a fundamental personal right necessary to make the express guarantees of the First Amendment meaningful. "The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them." (381 U.S. at 308). It would be a barren marketplace of ideas that had only buyers and no sellers. If the right to possess and to receive obscene material for private use is protected by the First Amend-

ment, it is submitted that protection must also exist for the right to publish and distribute the same materials. The publisher, printer and distributor must of necessity enjoy the same rights as those who receive and purchase material for their private use, since publisher, printer and distributor stand as surrogates for the rights of those who seek to possess the material. See, *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 64, fn. 6. In *Griswold v. Connecticut*, 381 U.S. 479, the Executive Director and Medical Director of the Planned Parenthood League were held to have standing to raise the constitutional rights of married persons, because otherwise "the rights of husband and wife, pressed here, are likely to be diluted or adversely affected". (381 U.S. at 481.)

In light of all of the foregoing, amici respectfully submit that the district court below correctly decided that the state obscenity statute violates the free speech and press guarantees of the First and Fourteenth Amendments.[2] *Stanley* is not essentially new doctrine; it is a logical development of the constitutional standards for judging obscenity. The trend of these developing standards has been away from restriction upon expression insofar as adults are concerned, with emphasis solely upon dissemination of material to minors or those persons unwilling to receive such material. "In this manner, 'public distribution' may be defined narrowly to denote those forms of distribution or display which thrust obscenity on unwilling individuals."

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[2]The Texas statute was held unconstitutionally overbroad, in the light of *Stanley v. Georgia*, by the Honorable Temple Driver, a Judge of the 89th District of Wichita County, Texas. The Findings of Fact and Conclusions of Law were filed on February 9, 1970, and are attached hereto as Appendix B.

Note, "The Supreme Court, 1968 Term", in 83 *Harvard L.R.* at 152. The right to receive obscene material is an attribute of privacy, a right protected by the Constitution. The right to distribute the material sustains the right to receive. The State's sole interest is in preventing forceable and unwanted intrusion into that privacy. The decision in *Stanley* gives assurance that expression will remain "uninhibited, robust and wide-open". *New York Times Co. v. Sullivan*, 376 U.S. 254, 270.

B. The issue of adult freedom of access to expression dealing candidly with sex and nudity should also be viewed, it is submitted, in light of the trend toward the abolition of criminal sanctions against all sexual practices not involving force, adult corruption of minors, or public affront. It has been urged, in the light of changing social and cultural standards dealing with sex, that no harm to the secular interests of the community is involved in atypical sex practice in private between consenting adult partners. American Law Institute, Model Penal Code, Tentative Draft No. 4 (1955), pp. 276-291. The premise underlying this position is that it is not a proper function of the criminal law to regulate private morality. Israel, "The Process of Penal Law Reform—A Look at the Proposed Michigan Revised Criminal Code", in 14 *Wayne L.R.* 772, 948-957 (1968). See also, Ill. Ann. Stat. ch. 38, §§11-1 to 11-20 (Smith-Hurd 1964); Note, "The Proposed Law of New York", 64 Colum. L.Rev. 1469, 1545 (1964).

The changing attitudes with respect to private consensual sexual conduct is also reflected in decisions of the courts. Cases emphasize that the right to privacy is

no less important than any other right safeguarded by the Constitution. The First Amendment, "has a penumbra where privacy is protected from governmental intrusion". *Griswold v. Connecticut*, 381 U.S. 479, 483. The courts have rejected the notion that the enforcement of morality without demonstrable individual harm, at the expense of liberty, is worth the price. It has been suggested that punitive measures under such circumstances may constitute cruel and unusual punishment, in violation of the prohibitions of the Eighth Amendment. An evaluation of the considerations which have led in the past to the prohibition of such private conduct has led to the conclusion by many courts that the prohibitions do not merit retention. See, *People v. Belous*, 71 A.C. 996, 458 P.2d 194, 80 Cal.Rptr. 354 (1969) (California abortion statute held invalid—"The fundamental right of the woman to choose whether to bear children follows from the Supreme Court's and this court's repeated acknowledgment of a 'right of privacy' or 'liberty' in matters related to marriage, family, and sex." 80 Cal.Rptr. at 359); *Morrison v. State Board of Education*, 1 C.3d 214, 461 P.2d 375, 82 Cal.Rptr. 175 (1969) (Private homosexual relations between teachers not subject to disciplinary action in absence of evidence that teacher's conduct indicated unfitness to teach); *Norton v. Macy*, 417 F.2d 1161 (D.C. Cir. 1969) (Alleged homosexual advance by protected Civil Service employee toward another was not sufficient to justify dismissal); *Cotner v. Henry*, 394 F.2d 873 (7 Cir., 1968) (Federal habeas corpus—Conviction under Indiana sodomy statute—Substantial question raised as to whether acts performed by married people with mutual consent could constitutionally be prohibited

by the State—"The import of the *Griswold* decision is that private, consensual, marital relations are protected from regulation by the state through the use of a criminal penalty." 394 F.2d at 875).

"In view of the aforesaid considerations, it is plain that the adult community should today at least be entitled to enjoy the fullest exercise of freedom of expression in the areas of sex and nudity. Whether material be deemed obscene or not, adults have the right to read, view and discuss for their personal edification, all ideas, including those dealing with sex. They have the right to be entertained and amused as well as to be informed, if the safeguards of freedoms of speech and press under the First Amendment are to be maintained. Individual autonomy in the area of sex is as essential to the welfare of the nation as in any other area of human concern.[4]

C. The decision in *Stanley v. Georgia*, holding that the private possession of obscene material may not be made criminally punishable under the Constitution, im-

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[4]Dr. Milton H. Miller, professor and chairman, Department of Psychiatry, Wisconsin Medical School, Madison, Wisconsin, when queried whether pornography was a threat to society or just a nuisance, replied:

"Pornography is a threat to society. Any fool knows that . . . At the present time pornography remains a threat to society, though it is 14th in line and it follows in seriousness (1) the threat of a nuclear war that would end civilization, (2) the Vietnam War, (3) general inflation, (4) death on the highway, (5) riots in the cities, (6) civil rights abuse, (7) persisting poverty, (8) crime in the streets, (9) air and water pollution, (10) abuse of natural resources (lakes, streams, and forests), (11) overpopulation, (12) billboard desecration of our highways, and (13) falling farm prices.

"Undoubtedly, pornography will remain a threat to society, but its seriousness will probably drop in the next ten years from 14th to 35th place." Quoted in *Censorship Today*, Vol. 1 No. 2, p. 29.

plicates issues of equal protection of the laws. In *United States v. Thirty-Seven (37) Photographs*, (D.C. Cal. 1970) Civ. No. 69-2242-F,[5] a three-judge district court held that 19 U.S.C. 1305 was unconstitutionally overbroad in the light of the ruling in *Stanley*. Among other things, the court stated, "The First Amendment cannot be construed to permit those who have funds for foreign travel to bring back constitutionally protected literature while prohibiting its access by the less affluent". A similar view was expressed by Circuit Judge Aldrich, writing for a majority of a three-judge court in *Karalexis v. Byrne*, (D.C. Mass. 1969) Civ. No. 69-665-J, appeal pending. Judge Aldrich stated, "If a rich Stanley can view a film, or read a book, in his home, a poor Stanley should be free to visit a protected theater or library. We see no reason for saying he must go alone".

It is axiomatic that in our constitutional system, rich and poor stand in equal relation under the law. Invidious discriminations between groups of affluent and poor persons are forbidden under the Constitution. See, *Griffin v. Illinois*, 351 U.S. 12. One who has the means may purchase books and magazines for home use; he may, if he so desires, view films in the privacy of his home or arrange for profesional entertainment therein. A person with lesser means will turn to the public libraries, the motion picture houses, or the theater for his entertainment and information. Clearly, there is no practical reason or constitutional justification for discriminating between such groups of citizens.

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[5] A copy of the opinion is attached as Appendix A to the Motion to Affirm in *Blount v. Rizzi*, October Term 1969, No. 788, pending in this Court.

The constitutional admonition that no State shall deny any person the equal protection of the laws stands as a barrier, it is submitted, against such distinctions.

D. Problems dealing with sex and nudity are human problems, and therefore have universal significance. For these reasons, amici deem it appropriate to bring to the attention of the Court the experience of Denmark, which has removed all legal prohibitions against the publication, sale and distribution of alleged obscene materials to adults. The sale of obscene material to a person under sixteen years of age is punishable by fine. Denmark also provides that it is illegal to obtrusively intrude upon people obscene materials they do not want to see. Subject to these two qualifications, all material dealing with sex and nudity may be read or viewed by Danish citizens.

As the report of the Ministry of Justice indicates (Appendix A), Denmark began consideration of the legalization of obscenity some time in 1964, when a permanent criminal law committee was requested to consider the need for a change in the existing statutes. The specific incident which triggered this re-examination of the obscenity statutes was the prosecution, and subsequent acquittal in 1964, of the Danish publisher of *Fanny Hill*. See, Buckley, "Oh! Copenhagen!", in New York Time Magazine, February 8, 1970, pp. 32, 34. The committee reported that under prior practice very few books had been found punishable and prosecutors and judges had found the task of defining the limitations of the law in individual cases to be almost a hopeless one. No one ever succeeded in stating a general definition of pornography on the basis of which the law might be interpreted. In addition, the evidence was lack-

ing in support of any assumption of harmful effects resulting from the reading of descriptions of sexual activity, even in its more extreme forms. The committee expressed the view that the obscenity laws ought not to be maintained merely on the basis of a moral evaluation of the books in question. The only consideration, insofar as the committee was concerned, was the question of preventing actual harm to individuals. Believing, however, that a distinction might be made between books and pictures, the committee recommended that the obscenity laws be repealed insofar as adults were concerned, with respect to written material only. Parliament adopted this recommendation in 1967.

Following the passage of the 1967 laws, there was a considerable decrease in the number of obscene books. On the other hand, obscene pictorial magazines—still illegal—increased in number. Considering the good experiences resulting from the 1967 amended statutes and the difficulties of enforcement, the Minister of Justice decided to introduce a measure to also make legal obscene pictures and objects. A parliamentary committee made extensive investigation and concluded that all restrictions on pornography be removed, except for sale to children under sixteen and to blatant intrusion upon privacy. The new law became effective on July 1, 1969.

In 1967, the year in which printed pornography was legalized, the number of alleged sex offenses reported to the police in Copenhagen dropped 25% from the preceding year. There was another 10% drop in 1968. Despite the legalization of all pornography, in the last six months of 1969 the figures declined even more dramatically for the year, down by 31%. See, *Buckley, supra*, p. 36.

The Danish experiment, it is submitted, has particular relevance here. To a large extent, the problems of that western nation were precisely the same as those which exist in this county, and the arguments for censorship followed the same pattern as those which have been made in the United States. The issues were resolved in Denmark because Denmark, like the United States, was vitally concerned with upholding freedom of expression. The Danish people recognized that the maintenance of adult censorship was justifiable only if required by weighty social reasons. None of the reasons advanced for such censorship, either as a practical matter of for other social or political reasons, was found acceptable. Indeed, all of the evidence indicates that the abolition of obscenity laws affecting adults has had an opposite effect from the effect predicted by the advocates of censorship. This appears to be the consensus of Denmark's psychiatrists, sociologists, teachers, and even clergymen and police officials.

Conclusion.

Amici respectfully submit that the decision and judgment of the district court was correct and should be affirmed. The Constitution of the United States, it is submitted, stands as a bar against any limitation upon the right of adults to read or view material dealing with sex or nudity for their own private use. The State's concern is properly limited to dissemination of material intended for minors or material disseminated in such a manner as to be obtrusively forced upon unwilling persons.

Respectfully submitted.

STANLEY FLEISHMAN,
MEL S. FRIEDMAN,
Amici Curiae.

APPENDIX A.

Report on Danish Criminal Code Amendments and Rules on Film Censorship Issued by Ministry of Justice, Copenhagen.

20, August 1969.
L.A. 1968. 20002.25.

Recent Danish Criminal Code Amendments Concetning Pornography.

1. The text of the *sect. 234* of the Criminal Code was *until 1967*:

"(1) Any person who

(i) offers or hands over to any person under eighteen years of age obscene publications, pictures or objects; or who

(ii) publishes or circulates or, for such purpose, produces or imports obscene publications, pictures or objects; or who

(iii) arranges for any public lecture, performance or exhibition of an obscene nature;

shall be liable to a fine or to lenient imprisonment ("haefte") or, in aggravating circumstances, to imprisonment for any term not exceeding six months.

(2) If any of the acts mentioned in subsect. (1) of this section is committed for commercial purposes, a fine may be imposed only in particularly extenuating circumstances.

(3) Any person who, for the purpose of gain, publishes or circulates or, for such purpose, produces or imports publications or pictures which, without being actually obscene, must be assumed

to be solely intended for a commercial exploitation of sensuality shall be liable to a fine or to simple detention for any term not exceeding one year".

2. In December 1964 the Danish Minister of Justice asked the *Permanent Criminal Law Committee* to consider the need of a change in the Criminal Code Section 234 on pornography. The Committee submitted its report in June 1966, and the report was published under the title: "(Betænkning No. 435, 1966) Strafferetsrådets betænkning om straf for pornografi."

Three members of the Committee recommended that the criminal offence of producing, publishing or circulating obscene books, magazines etc. should be removed from the Criminal Code, whereas one member was in favour of retaining a criminal law prohibition in this field. All four members agreed that it was not advisable to give obscene pictures entirely free at the same time.

The Criminal Law Committee found the question a difficult one to solve, and the report gives rather a detailed statement of the arguments. There were perhaps two main arguments for the change which was proposed.

First, it was a fact that under court practice since the 1950's the previous law had already been interpreted so liberally that very few books (and no books of some literary merit) were found punishable. Thus, by maintaining the prohibition against obscene literature it would in any case be impossible to reach more than a very limited part of the total production of dirty books.

For prosecutors and judges the task of defining the limits of the law in individual cases was an almost hopeless one. No one has ever succeeded in stating a general definition of pornography on the basis of which the law might be interpreted.

Secondly, practically all the evidence brought forward by criminologists, psychiatrists, psychologists, sociologists etc. was to the effect that there was no reason to assume more than a remote risk of harmful effects—even on young persons—from the reading of descriptions of sexual activity, even in its more extreme forms. On the other hand it was admitted by the experts that there was relatively scarce evidence that harmful effects could *not* occur. Apparently the actual situation is that very little systematical research has been carried out, so that conclusions have to be based on the more general clinical experience of psychiatrists and psychologists. On that basis the experts expressed the negative conclusion mentioned above. In the course of later public and political discussions people in favour of a statutory prohibition had no possibility of referring to expert opinions.

It was the declared standpoint of the Committee, that the previous rule ought not to be maintained merely on the basis of a moral evaluation of the books in question. The justification of the rule ought as far as possible to be found in considerations of practical usefulness, particularly the question of preventing a risk of harm being done to individuals.

The question of making a distinction between books and pictures caused much discussion. However, the Committee found it advisable to make this distinction, partly because pictures may have a tendency to produce more direct psychological effects, as compared with books, where the reader will normally have good opportunities to stop reading when he finds that he does not like the book.

3. The *Minister of Justice*, acting upon the advice of the Committee, introduced a Bill to amend sect. 234, which was enacted by Parliament in June 1967. The new version of the provision was the following:

> "Any person who
>
> (i) offers or hands over to any person under eighteen years of age obscene pictures or objects; or who
>
> (ii) publishes or circulates or, for such purpose, produces or imports obscene pictures or objects; or who
>
> (iii) arranges for any public lecture, performance or exhibition of an obscene nature;
>
> shall be liable to a fine or to lenient imprisonment ("haefte") or, in aggravating circumstances, to imprisonment for any term not exceeding six months."

The chief amendments came into force on the 16th August 1968. This was bound up with the denunciation by Denmark of the Convention relating to the Suppression of the Circulation of and Trade in Obscene Publications concluded at Geneva on 12th September 1923.

4. According i.a. to the evidence given by the Danish Publishers' Association, the period after the 1967 amendment saw a considerable decrease of the number of obscene books. This confirmed the hopes of the legislators that the liberalization would "dedramatize" the situation as to this literature, the attention of the public being no longer attracted thereto by the machinery of justice. On the other hand, the number of obscene pictorial magazines—still illegal—was considerably increasing, giving rise to evident difficulties in the enforcement of the penal provision. Because of the quantities, the police were unable to control all publications, and it was often not possible to enforce seizures, eventually decided upon, until large parts of the stocks had already been sold. Furthermore, because of the rather rough criteria which had to be adapted for practical reasons, a great number of erotical pictures were not prosecuted, so that it might seem arbitrary, in relation to the intended protection of public decency, to prosecute just the others. Should it be decided to strengthen the efforts to enforce the provision of pornography, other fields—maybe of a more evident social importance—would be weakened correspondingly.

Taking into consideration the good experience of the 1967 amendment and the difficulties of enforcement mentioned above, the Minister of Justice decided to introduce a Bill to make legal also obscene pictures and objects. In his introductory speech in Parlament he also emphasized the considerations for the personal freedom:

"Even if a liberalization can be hoped to decrease the interest in these pictures etc., of course you have to face the fact that there will still be some persons interested to buy them. It is, however, a question whether this is a sufficient argument against the liberalization. In my view, by leaving the decision to the individual, you will strengthen the development, which can be observed in so many fields in these years, towards a greater freedom for the individual citizen to plan his own life and towards the greater personal responsibility following from that."

However, the Minister found that there would be good reason to retain a protection of young persons, but found it natural to lower the age to 16 years to conform with the young persons under the Film Censorship Act, amended at the same time.

Parliament enacted the Bill by 112 votes for, 25 against and 4 abstentions.

5. The text of sect. 234 as amended is as follows:

"Any person who sells obscene pictures or objects to a person under 16 years of age shall be liable to a fine."

The provision came into force on 1st July 1969.

6. The amendment mentioned does not imply that it is legal to intrude upon people obscene materials they do not want to see. On the contrary, during the preparatory works of the new legislation, much attention has been devoted to the protection against such intrusion.

a. Already, according to sect. 232 of the Criminal Code,

> "any person who by obscene behaviour violates public decency or gives public offence shall be liable to imprisonment for any term not exceeding 4 years or, in extenuating circumstances, to lenient imprisonment ("haefte") or a fine."

b. In connection with the Criminal Code amendment the *Police Byelaws* have been amended in order to prevent i.a. exhibitions or distributions of offensive publications or pictures in public streets or places. It is understood that the word "offensive" is more comprehensive than the word "obscene".

The Byelaws also prohibit the delivering in houses of offensive publications or pictures to other inhabitants than those who have, *expressis verbis*, ordered such things.

7. According to the *Postal Act*, it is a criminal offence to post to foreign countries objects excluded by the Universal Postal Convention, i.a. objects the import or distribution of which is prohibited in the country of destination, and obscene or immoral objects. It is not a criminal offence to export obscene material by other means; however, foreign customs authorities have far better possibilities to detect the character of the goods in these cases than in the case of mailed goods.

Annex.

Sex Crimes in Denmark 1963-68.

According to the Annual Report of the Police for the year of 1968—recently published—the total number of sex crimes coming to the knowledge of the police was in

1963	4.364
1964	3.968
1965	4.316
1966	4.210
1967	3.275*
1968	3.060

Except for 1968 these figures can be broken down to show the trends of the most important categories of sexual offences:

	1963	1964	1965	1966	1967
Rape etc.	173	259	162	215	203
Other heterosexual offences.	3325	2940	3386	3080	2458
of these against children under 15 years	1583	1421	1534	1297	909
Homosexual offences	432	364	281	593	233*
of these against children under 15 years	304	204	210	491	171

*The provision criminalizing receiving payment for committing sexual immorality with a person of the same sex was repealed as from the 1st July 1967.

The Danish Rules on Film Censorship.

1. The question of the maintenance of film censorship had been in the focus of the public debate for some time when in July 1963 the Minister of Justice appointed a Committee to consider whether to change the rules in force.

2. The Committee submitted their Report in December 1967. A summary of the report, including also a survey of the legislative development in this field, is enclosed.

3. The Minister acted upon the advice of the Committee, introducing a Film Censorship Bill in accordance with the draft included in the Report.

4. The Bill was enacted by Parliament (Act No. 135 of 29th March 1969) and entered into force on the 1st July 1969.

5. The new Act does not apply to films entering the State *television* programme, to which special supervision rules apply. A cooperation between the television authorities and the Film Censorship Board has, however been foreseen.

Summary of the report submitted by the film censorship committee.

1. The Committee, which was composed of nine members with Professor Thomas Sigsgaard in the chair, was appointed by the Minister of Justice on July 4th. 1963. The Committee was charged with considering whether the existing arrangements relating to film censorship should be changed and, if so, to make recommendations on the subject. As a basis for its recommendations the Committee should examine the investi-

gations that has been made of the impact of the cinema on its audience, more particularly on children and young people, as well as the most important foreign systems of censorship.

The Danish Committee has co-operated closely with the Film Censorship Committee that was appointed in Sweden in October 1964. Like the Danish one, the Swedish Committee is charged with considering the question of changing the existing arrangements in regard to censorship.

The Committee's examination of the existing research dealing with the impact of the cinema on its audience was based on an account of this research that is included in Annex 1. The account was prepared, at the request of the Committee, by Gerhard Nielsen, Ph.D., lecturer at the University of Copenhagen.

In addition, the Committee to a large extent has relied upon the research that in recent years, in close contact with the Swedish Film Censorship Committee has been carried out in Sweden under the guidance of the Swedish Film Institute (Svenska Filminstitutet). A summary of the findings of these research projects is given in a Report submitted by the Swedish Film Institute entitled: The Impact of the Cinema on its Audience (Filmens inflytande pa sin publik), which was published in June 1967 as part of the Reports of the Swedish Committee.

The Committee has further taken into account the information contained in the Report of the Danish Criminal Law Council on the punishment of pornography (Report No. 435/1966).

Finally, the Committee has acquainted itself with part of the material of the Sub-committee of the Euro-

pean Committee on Crime Problems that has been concerned with the relationship between the mass media of communication and juvenile delinquency.

2. Denmark has had special film censorship since 1913. The existing provisions on censorship are found in section 20-23 of the Cinema Act, No. 117, of April 13th 1938, as amended by the Act, No. 133, of March 31st 1960. These provisions provide for films to be approved by the State Censorship Board before being shown in public. The Board is not allowed to approve films liable to offend public decency or to have a brutalising or otherwise demoralising effect.

Films that are deemed likely to have a harmful effect upon children's minds or their conception of justice can not be approved for showing to children. Until 1960, there was only one age level in the case of films to which children were not admitted, namely 16. The 1960 Act provided for another age level of 12. The film censors may now ban the exhibition of a film to children under 16 or under 12 years of age.

The censorship is exercised by film censors appointed by the Minister of Justice. The Cinema Act does not provide for the number of censors, nor for their qualifications. The Board today is composed of three regular censors and one substitute member. One of the censors, normally an official of the Ministry of Justice, acts as the administrative head of the Censorship Board.

An appeal may be made from the decisions of the Board to the Minister of Justice.

3. A survey of the *practices of the Censorship Board* is included as Annex 3 of the Report. It shows that the decisions of the Board on feature films from April

1st 1960 (after the introduction of the 12-year level) to March 31st 1967 are made up as follows:

Approved for all audiences	about 28	per	cent	
Children under age 12 not admitted	–	15	–	–
Children under age 16 not admitted	–	52	–	–
Totally banned	–	1	–	–
Provisional decisions	–	4	–	–

4. The prime question before the Committee was whether the power to *ban films for showing to adults should be maintained.*

The Committee based its consideration of that problem on the view that regard for freedom of expression militates against any form of censorship and that the maintenance of adult censorship, then, is justifiable only if required by weighty social reasons. In this context the Committee points out, that today films are the only means of expression that is subject to a system of state censorship in Denmark.

In evaluating the question of censorship, account should, in the opinion of the Committee, be taken also of the radical changes in the economic, social and cultural structure of society that have taken place in the course of the last few decennia. As result of this development, large groups of the population today get into contact with the outside world to a far greater extent than formerly and thus become acquainted with events and conditions outside their own environment. In this connection, the rapid expansion of television and other mass media of communication has played an important role. Owing to the growth of television, in particular, the

cinema does not occupy the same position of prominence as before among the mass media of communication.

As a result of this trend, the principal consideration underlying adult censorship, namely the wish to protect the population against undesirable influences likely to emanate from films, no longer carries the same weight. In this context, it is pointed out that the cinema as a factor of influence cannot be isolated from the numerous other factors affecting the individuals, and that there is no scientific proof of the frequently made assertion that the cinema has a different and stronger impact than other factors.

The problem of censorship should also be viewed in light of the trend that has made itself felt in Denmark in recent years towards abolition or modification of measures that restrict the free scope of the citizens. The most recent example of that tendency of liberalisation is the abolition of the provision of section 234 (on pornography) of the Criminal Code, as far as printed material is concerned.

The Report points out that a system of state censorship cannot be justified by the desirability of controlling the films purely on moral or aesthetic principles. The Committee considers it unacceptable in principle that the exhibition of a film should depend on whether a state agency approves the film with reference to specified ethical and aesthetic criteria. To this must be added that it would hardly be possible to lay down any reasonably objective standards governing the exercise of censorship based on such criteria. Hence, there would be a risk that the decisions of the censors were made on the basis of their personal views as to what should be regarded as morally objectionable or artistically inferior.

Nor can the maintenance of censorship, in the opinion of the Committee, be justified by referring to the fact that production of films largely take place with the primary aim of making a maximum profit, and not from the wish of producing artistically valuable films. Commercial speculation in the supposed wishes and needs of the public takes place in many other fields where there is no question of any similar regulating measures. Obvious examples are pulps, serial magazines and certain weeklies.

For the Committee the crucial point has been whether the showing of certain types of films is likely to bring *more serious harm* to an adult audience. If it is not possible to show, or at least render probable, the existence of such harmful effects, it is difficult to justify the maintenance of adult censorship.

5. The Committee has made an evaluation of possible harmful effects on the basis of the rules in force (see above under paragraph 2).

(a) As regards the power to ban films from showing to adults by reason of *depictions of sexual relations* (*"violation of public decency"*), the Committee considers that there is not sufficient justification for maintaining that ground for prohibition. According to the existing scientific evidence, there is no basis for assuming that depiction of sexual relations should have any harmful effects. Moreover, the difficulties of separating the judgment of the harmful effects of a film from evaluations based on moral criteria make themselves particularly felt in this field.

(b) The Committee was more doubtful as to whether the provision for banning films of *such a nature that*

their exhibition would tend to have a brutalising effect should be maintained. The existing investigations seem to indicate that a large-scale viewing of films which contain scenes of violence and glorify the use of violence may tend to enhance an already established anti-social attitude, which in the long run may result in acts of violence. As it is not primarily a question of the possibility of releasing isolated acts of aggression, but of long-term influences on general attitudes, it would be difficult to provide any clear scientific evidence of such influences.

A judgment of the possibility of objectionable influences of films of violence should take into account that, as already mentioned, the production of films is largely determined by purely commercial considerations. This being the case, the production of films of violence is likely to continue as long as such films attract a sufficiently large audience. Further, if censorship is abolished, one must face the risk of a number of films being imported or produced which up till now have been kept back by producers and distributors, who expected them to be banned. The best protection against a decline in the standard of the repertory of the cinemas would be the reaction of the audience and public opinion, which reflected notably through the press and other mass media. The Committee considers that great importance should be attached to the influence on the repertory that may be exercised in that way. As the appreciation of the art of the film is developed, among other things through increased education, there is reason to believe that a positive influence may emanate from the audience and the press.

In considering whether the risk of harmful influences is sufficient to justify the maintenance of adult censorship, it should be kept in mind that the number of films that are totally banned or in which cuts are made as a condition of approval for showing to adults is very small. At present a large and probably increasing number of films containing scenes of violence is being shown. As regards certain war films, in particular, it can be recognised that censorship has been no very active barrier. A really effective contribution on the part of the Film Censorship Board to obviate the risk of a brutalising influence would require the taking of a much harder line than before in the rating of films of that category. Even if adult censorship was maintained, the Committee would consider it unrealistic to count on the feasibility of so tightening the practice of the Board. Nor does the Committee consider it reasonable that, from the wish of eliminating or reducing the risk of objectionable influences on a minor section of the audience, a change of practice should be made that would inevitably affect also a number of serious realistic films.

Conversely, the abolition of censorship, even allowing for any preventive effect, will hardly in the long term imply any decisive change in the cinema repertory.

Besides in the opinion of the Committee considerable importance should be attached to the above mentioned fact, that the population today to a much greater extent than before is exposed to influences from other sources, notably from the other mass media of communication.

In the light of this, the Committee sees no reason to assume that the abolition of censorship in regard to films would imply any substantially increased risk that

the adult population would be exposed to harmful influences in the way of brutalisation or "dehumanisation". The Committee therefore considers that there is not sufficient justification for maintaining the provision for banning films for that reason.

(c) As already mentioned, the third ground for disapproval provided for in the Cinema Act is to the effect that films must not be approved if they are *deemed likely to have a (brutalising) or otherwise demoralising effect*. The application of that ground presupposes that the Censorship Board will make a decision that is not primarily based on an estimation of the possible harmful efects of the film, but on moral or ethical principles. As the Committee finds it unacceptable in principle that a state censorship agency should be able to ban films on the basis of such an evaluation, the Committee cannot recommend maintenance of the provision for banning films by reason of their supposed demoralising effect.

(d) In the light of the available evidence, there is no reason to believe that there should be any *other effects that may be characterised as harmful to a normal adult audience*. In this context, the Committee leaves out of account the possible influence of certain films on the audience's concept of reality, such as films giving a distorted, "rosy" picture of life. Large-scale viewing of such film may contribute to the reduction of the ability of the audience to form a realistic picture of the surrounding world. Whether or not such an effect is considered harmful, there can be no question, according to the Committee, of any censorship on that basis.

6. In the light of what is stated under paragraph 5, the Committee has reached the conclusion that there are

no sufficiently weighty reasons for maintaining the power of any state authority to ban films from showing to adults. The Committee has considered whether private censorship is likely to be established in the case of the abolition of state censorship. It is probably not precluded that the film industry will try to obviate the risk of violating the pornography provision of the Criminal Code through the establishment of a sort of censorship on a voluntary basis; on the other hand, private censorship like that is unlikely to be effective. This also applies to censorship exercised by private groups or societies with a view to influencing the cinema repertory.

7. One member of the Committee, who represents the cinema owners, has not been able to endorse the proposal for abolishing adult censorship. The member concerned argues that the abolition of adult censorship in his opinion will result in the Danish film market being flooded with horror films and films of violence. The release of such inferior films will substantially lower the standard of the cinema repertory, which will be a disservice to cinema-owners and decent audiences alike.

8. The Committee was in agreement that the provision for *banning films from showing to children should be maintained.*

(a) First of all, the Committee points out that according to the available evidence about the influence of the cinema on its audience there is reason to believe that in certain circumstances films may have a harmful impact upon the minds of children.

Moreover, there is reason to believe that, unlike what is the case for adults, at least under the present practice, such harmful effects may to some degree be obviated

through censorship. In this connection, the Committee has taken into consideration that, today at least, the possibilities of counteracting the objectionable effects of the cinema through constructive measures, such as film education, are inadequate.

Finally, the Committee has stressed that the considerations that may be advanced against adult censorship, first of all regard for freedom of expression, do not make themselves equally felt in the case of regulating measures in relation to children, who, on the one hand, have a right to protection on the part of society and, on the other, have little opportunity of taking part in the creation of public opinion.

(b) As regards the *risk of harmful influences*, the Committee places the chief emphasis on the possibility stated above in paragraph 5(b) that the cinema may have a *brutalising effect*. That risk is likely to be greater in case of children than of adults.

In this context, the Committee has discussed the relationship between the cinema and juvenile delinquency. On the strength of the existing evidence there is no basis for assuming that juvenile delinquency can be directly traced to film viewing. Rather, there is reason to believe that any large-scale viewing of films of violence is a symptom of more deep-rooted psychic difficulties that may lead to juvenile delinquency. However, the Committee will not exclude the possibility that the generally brutalising effect of excessive film attendance, combined with other factors, may have a certain significance in relation to criminality.

The other main category of films which in the opinion of the Committee may have harmful effects consists

of film *with a content that might frighten or provoke anxiety in children.* This effect could be harmful in particular to the younger child.

In addition, the Committee recommends that the film censors should be empowered to prevent a film from being shown to children if it contains *sexual depictions which the censors consider harmful to children in the age groups provided for.*

Finally, the Committee recommends that there should be a provision for banning films from showing to children by reason of descriptions *clearly inciting to discrimination of persons belonging to a particular race or creed.*

As to the drafting of the legal provision on child censorship, the Committee would find it most appropriate not to make any detailed indication in the legal text of what harmful effects may be envisaged, partly because such an indication cannot be in any way complete, partly because the Censorship Board should be given a reasonable opportunity to change its practice in accordance with changes in the attitudes of experts. Hence, the Committee has chosen a draft according to which the Censorship Board shall make its decision *on the basis of a judgment as to whether the film is likely to be harmful to children.*

9. Notwithstanding the fact that the existing scientific evidence seems to show that the personality of the individual is a more significant factor than is biological age, as regards the harmful influence of a particular film, the Committe considers that child censorship can only be based on specified age levels. As for the age levels the Report states that the research in this field

seems to provide a certain support for fixing an age level at 12. On the other hand, the findings do not seem to call for another and higher age level. The Committee was agreed, however, that there should continue to be provisions for banning films from showing to children over the age of 12, and that the system introduced in 1960, providing for two age levels, should therefore be maintained. In this connection, the Committee has taken account of the fact that the existing research material is too limited to permit any definite conclusions as to the need of an age level higher than 12. The Committee considers that general experience confirms that there is a substantial difference in susceptibility between 10 to 11-year olds and 14 to 15-year olds. In the opinion of the Committee, protection of children in the latter age group is needed primarily because of the harmful influence that may emanate from films of violence. Such films are liable to exercise an influence that in the long run may result in the "dehumanisation" of the attitudes of children. The fact that an influence of that nature has not been established scientifically cannot be decisive considering the extremely great difficulties involved in carrying out research in this field. As matters now stand, it would not be advisable to abolish the provision for banning films from showing to children of 12 or over.

The available scientific evidence does not provide any certain basis for determining the second age level. In the absence of such evidence the Committee recommends maintenance of the present age level of 16. Accordingly, the Committee recommends that *the present age levels of 16 and 12 be maintained.*

The Committee has also considered whether the abolition of adult censorship may justify that the 12 and 16-year levels be supplemented by a provision for banning films from showing to youngsters under 18 in special cases. The 18-year level should mainly be applied to films which according to the present practice of the Film Censorship Board would be totally banned or in which considerable cuts would be made as a condition for approving the film for showing to adults. The recommendation of the Committee to maintain child censorship is, as mentioned previously, chiefly due to the fact that children are more susceptible to influence by films than are adults. Some members of the Committee are of the opinion that the susceptibility, though decreasing as the young person approaches adult age, still at the ages of 16 to 18 is so great that in fact there might be a case for raising the age level to 18 in the case of films deemed likely to have a particularly brutalising effect. In this connection it should be kept in mind that the impossibility of fully ensuring the observance of the age levels, makes it likely that a number of 14 or 15-year olds will see films that are banned from showing to children under 16. Owing to the difficulties of effectively enforcing the age levels, however, the advantage of having two age levels so close to each other as 16 and 18 is doubtful. It would even be possible that the main effect of fixing the age level in special cases at 18 would be that of giving the film an unintended, but effective publicity. Also the fact that the harmful effect is likely not to be associated with the individual film, but to presuppose that the child or youngster sees a large number of films of a particular category, makes it doubtful whether there is sufficient

reason for legalising an age level that is designed to apply only in exceptional cases. For these reasons the Committee has chosen to refrain from recommending that the present age levels be supplemented by an 18-year level.

10. As far as the *organisation of the censorship* is concerned, the Committee recommends that the Board should be composed of persons who by virtue of their education possess the necessary qualifications for making an expert judgment of the suitability of a film for showing to children in the legally established age groups. As a result, the censors should be persons with an educational or physchological training.

Further, the Committee recommends that the censors be appointed for four-years terms and that re-appointment may take place if the person concerned is under the age of 60.

11. As regards *appeal against the decisions of the Film Censorship Board*, such appeal may under the present arrangements be made to the Minister of Justice. The Committee recommends a change in that arrangement so that an appeal would be made to a special board of appeal.

Having regard to the nature of the decision to be made, the Committee proposes that the board of appeal should include educational and psychological experts. The fact that the task of the board is to review decisions made by experts might indicate that all or in any case the majority of the members of the board of appeal should be in possession of the same expert knowledge as the censors. The Committee considers, however, that it would be more appropriate for the final de-

cision to be made by a somewhat broader forum, the view being that decisions made solely by experts are liable to be marked by attitudes which according to generally accepted notions are one-sided. In determining whether a film should be approved, it would seem reasonable that more general social views and judgments might also be heard.

The Committee recommends, then, that the Board of Appeal be composed of five members, one of whom should be a legal expert, two being trained educators and/or psychologists, and two being chosen among persons who have shown interest in film and are familiar with child and youth problems. The Committee would prefer that none of the members be appointed as representatives of organised groups.

The Committee also recommends that, as regards term of office and age limits, the same rules should apply to the Board of Appeal as to the Film Censorship Board.

APPENDIX B.

Findings of Fact and Conclusions of Law, Hon. Temple Driver, Judge of District Court, Wichita County, Texas.

Filed for Record at 3:52 o'clock P.M. Feb. 9, 1970.

State of Texas vs. Steve Scott and Cinne Arts Theatre, Inc. No. 87,174-C.

In the 89th District Court of Wichita County, Texas.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

I.

This lawsuit was originally initiated and brought by The State of Texas through the County Attorney's Office of Wichita County, Texas, in the above-styled and numbered cause, pursuant to Article 527, as amended, of the Penal Code of the State of Texas, seeking an injunction and destruction of alleged obscene press materials.

II.

Among numerous motions filed by Defendants, a Motion to Dismiss this Lawsuit and Motion to Declare the Texas Obscenity Statute, Article 527, Unconstitutional and Void, was filed before the hearing, the evidentiary hearing for temporary injunction. Said motion was filed on January 26, 1970, and set for hearing on oral argument for February 9, 1970, at 9:00 a.m.; and further, both parties were ordered to submit legal briefs on the constitutional questions presented in the said motions.

III.

After having considered legal briefs submitted by both parties and oral argument regarding the Motion to Dismiss this lawsuit and Motion to Declare Texas Obscenity Statute, Article 527, Unconstitutional and Void, the Court is of the opinion that the said statute is unconstitutional for the following reasons, and in the following Sections:

A. Section 3, of Article 527, as amended, is unconstitutional, in that it is over broad, and fails to differentiate between public and mere private distribution, and fails further to differentiate betwen public and mere private possession of alleged obscene materials, all in violation of the following cases, Stanley v. Georgia, 89 S. Ct. 1243; Stein v. Batchelor, 300 Fed. Sup. 602 (United States District Court for the Northern District of Texas), Dallas Division, Judges Goldberg, Circuit Judge, and Hughes and Woodward, District Judges, presiding; Karalexis v. Byrne, Civil Action 69-665-J (three judge court United District Court for District of Massachusetts); and United States of America v. 37 Photographs; United States District Court for the Central District of California (three judge court—Civil Action 69-2242-F), wherein the Federal Customs Law, 19 USC 1305 was struck down as unconstitutionally overboard.

B. Section 1-E of Article 527, as amended, of the Texas Penal Code, is unconstitutionally overbroad in that in its definition of "distribute" it also fails to differentiate between public and merg private distribution, in violation of the cases set out above.

C. Section 9 of Article 527, as amended, of the Texas Penal Code, is unconstitutional in that it specifi-

cally sets forth an ex parte search warrant provision in violation of the following cases: Marcus v. Search Warrants, 367 U.S. 718; A Quantity of Copies of Books v. Kansas, 378 U.S. 205; Fontaine v. Dial, 303 Fed. Sup. 436 (three judge court of the United States District Court for the Western District of Texas) Tyron, Inc. v. Wilkenson, 410 Fed. 2d 639; and numerous other cases, all requiring a prior-adversary-determination of the obscene nature of the press materials involved, before any search, seizure, arrest or any other criminal process can be instituted against press materials.

D. Section 1. Subsection F, of Article 527, as amended, of the Texas Penal Code is unconstitutionally vague and overbroad in setting forth the constitutionally required scienter element of knowledge by constructively imposing knowledge through a use of vague and indefinite terms so as to amount to absolute and strict liability in violation of the following cases: Smith v. California, 361 U.S. 157; New York Times Co., et al v. Sullivan, 376 U.S. 254; Noto v. U.S., 367 U.S. 290; Hartzel v. U.S., 322 U.S. 680; Baumgartner v. U.S., 322 U.S. 665; Schneiderman v. U.S., 320 U.S. 118; all holding that absolute and strict liability in the knowledge element in any prosecution seeking to restrain freedom of speech violates the constitutional protections of the First Amendment to the United States Constitution.

E. Section 13, of Article 527, as amended, of the Texas Penal Code is unconstitutional in that it fails to define proper procedural safeguards to protect freedoms of speech and press of the First Amendment to the United States Constitution when the State seeks

to restrain freedom of press by the use of the injunction remedy set out in this section of the statute, all in violation of Freedman v. Maryland, 380 U.S. 51; as more specifically applied in Grove Press, Inc. v. City of Philadelphia, 418 Fed 2d 82; in that the injunction section, Section 13, fails to set forth proper procedural guidelines in order that freedom of the press would not suffer unconstitutional suppression under this section of the statute. It fails to set forth, for example (a) the procedural guidelines for issuing temporary and permanent injunctions; (b) it fails to set forth proper guidelines as to the date and time of defendant's answer, the type of evidence to be used and produced at such a hearing, and more specifically, it fails to set forth the burden of proof before an injunction should issue restraining freedom of the press. Further, this section fails to provide for adequate notice to a defendant to be able to answer and defend allegations raised in a petition for injunction, in that it sets forth a trial setting which could be within one day after joinder of issue; this particular section fails to comply with the full scope of the "prior-adversary proceeding" which is constitutionally required by the above stated cases.

For all the above reasons stated, this Court specifically finds that those sections here-above stated are unconstitutional and violate defendant's rights under the First and Fourteenth Amendments to the United States Constitution of freedom of speech and press, and this Court hereby and herein orders, adjudges and declares the above and foregoing sections of Article 527, as amended, of the Texas Penal Code unconstitutional, void and held for naught.

IV.

The State of Texas has herein timely given notice of appeal and this Court recognizes under Rule 499 A of the Texas Rules of Civil Procedure, that such appeal would be a direct appeal to the Supreme Court of Texas; this case will be directly referred to the Texas Supreme Court for further adjudication on the constitutional questions presented herein and the judgment of this Court.

The State of Texas, by and through its law enforcement agencies here in Wichita County are permanently enjoined from any further law enforcement of Article 527, as amended, of the Texas Penal Code.

Signed and Entered this 9th day of February, 1970.

/s/ Temple Driver
Temple Driver, Judge Presiding

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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 41

CHARLES BATCHELOR, Chief of Police, City of Dallas, *et al.*,

Appellants,

—v.—

BRENT STEIN,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

APPELLEE'S BRIEF

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Dombrowski v. Pfister, 380 U.S. 479 (1965) 5, 11, 13-14, 15, 16

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Fenster v. Leary, 264 F. Supp. 153 (S.D.N.Y., 1966), *aff'd* 386 U.S. 10 18

Golden v. Zwickler, 394 U.S. 103 (1969) 18
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Harman v. Forssenius, 380 U.S. 528 (1965) 14

Keefe v. Geanakos, 418 F.2d 359 (1st Cir. 1969) 12
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Sullivan v. State, 401 S.W.2d 246 (Tex. Crim. App., 1966) 14

United Public Workers v. Mitchell, 330 U.S. 75 (1947) 18

Williams v. Rhodes, 393 U.S. 23 (1968) 10
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Other Authorities:

Morreale, *Obscenity: An Analysis and Statutory Proposal*, 1969 Wis. L. Rev. 421 9

The Supreme Court 1968 Term, 83 Harv. L. Rev. 7 (1969) 10

The Chilling Effect in Constitutional Law, 69 Colum. L. Rev. 808 (1969) 14, 15

The Federal Injunction as a Remedy for Unconstitutional Police Conduct, 78 Yale L. J. 143 (1968) 14

Sen. Rep. 1005, 73rd Cong. 2d Sess. (1934) 18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 565

CHARLES BATCHELOR, Chief of Police, City of Dallas, *et al.*,
Appellants,

—v.—

BRENT STEIN,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

APPELLEE'S BRIEF

Statement of the Case

Appellants' brief omits or obscures certain salient facts, requiring an expanded statement of the case.

In October 1968 the Dallas police decided it was time to do something about *the "Dallas Notes"* (Snider Deposition 11,12). They were concerned with the "pornography and the newspaper in general" (App. 63). The office of the District Attorney was asked if it would "accept" an obscenity complaint (App. 63) based upon the October 16th issue of the paper (attached as Ex. 2, Snider Deposition). An Assistant District Attorney, although he did not "read it all," stated that the paper looked obscene to him (App. 63).

Armed with this assurance the Dallas police obtained a search warrant[1] authorizing a search of the residence of the publisher Stein; a portion of the residence was used as an office for the "Dallas Notes" (App. 66). The warrant authorized a search for "obscene" material (App. 11-12). During the night of October 30, a dozen police officers and trustees descended upon Stein's residence (App. 65), the officers had the foresight to provide two trucks to facilitate the search (Srider Deposition 32). Stein and five other persons on the premises were arrested and some two tons of newspapers and periodicals were seized along with four typewriters, a camera, $5.43 in money, and miscellaneous personal property (App. 13, 67).

Charges of possession of obscene matter in violation of Article 527 of the Texas Penal Code were later filed against Stein and the others arrested (App. 81). The charges were based in part upon photographs seized in Stein's bedroom (Snider Deposition 70).

On the night of November 15, 1968 the Dallas police returned to Stein's residence, forced the door (Monaghen Deposition 6), and once again searched the premises. The officers came under the guise of a "marijuana" search warrant (App. 14-15). No drugs were discovered. However, since after the first raid Stein had managed to gather equipment and resume publication, the police "cleaned house again" (App. 16, 17, 72), seizing cameras, lights, drafting tables, telephones, typewriters and miscellaneous personal property (App. 16-17). When asked why he had seized a poster of Mao Tse-tung, Officer Monaghen explained, "I

[1] The application for the warrant was presented to the magistrate while he was attending a hockey match; the magistrate was not shown a copy of the newspaper in question (App. 64).

didn't know what to seize and what not to seize so I just took everything" (App. 74). Stein was again charged with unlawful possession of obscene material. This charge was based upon issues of the newspaper and some motion picture advertising posters (Snider Deposition 91-93).

Both raids on the Stein residence were directed by Lt. Snider, the head of the Dallas vice squad. Lt. Snider considered himself empowered by Article 527 "to make on the spot determinations as to the obscenity of given material and to confiscate that material [he] deem[ed] to be obscene" (App. 68). Snider did not feel compelled to weigh the entire content of the newspapers in determining their obscenity (Snider Deposition 57-58).[2] There is no plausible argument that would justify treatment of the newspapers as obscene.

Stein sued in federal court asserting jurisdiction under Section 1343, and alleging unsuccessful attempts to recover the confiscated property. He sought a preliminary injunction requiring return of the seized material, an injunction against future police harassment and against the prosecution of the pending criminal cases as well as a declaration that Article 527 was unconstitutional. The filing of the suit resulted in the return by the Dallas police of the material confiscated in the two raids,[3] including such items as credit cards, costume jewelry, cans of spices, a brown sweater, and a "statue of a man and woman in an embrace." Amended pleadings deleted the prayer for injunction

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[2] The search warrant for the October 15th raid alleged that "this newspaper contained obscene four (4) letter words" (App. 10).

[3] A full list of the seized items that were returned appears as Exhibits 3, 4, 14 and 15 to the Snider Deposition.

against pending prosecutions and sought only injunctive relief against future arrests and prosecutions under Article 527 and a declaration that the statute was unconstitutional (App. 77-78). Plaintiff moved for partial summary judgment, urging in support an intention to continue publication of the "Dallas Notes" in a similar vein (App. 59-61). The three-judge court granted summary judgment, declaring Article 527 unconstitutional and enjoining future enforcement of the statute. The Court did not enjoin the state from pressing its pending prosecutions against Stein.

Summary of Argument

The court below properly ruled the Texas obscenity statute unconstitutional on its face. A statute which punishes mere private possession of obscene material as well as other purely private activities is an unwarranted intrusion into the area of private speech protected by the First Amendment. *Stanley* v. *Georgia*, 394 U.S. 557 (1969). Moreover, the statute did not limit its application to material "utterly without redeeming social value," a standard which is constitutionally mandated to prevent unwarranted encroachments upon protected speech. *Memoirs* v. *Massachusetts*, 383 U.S. 413 (1965). Finally, the Texas statute was constitutionally overbroad in that it proscribed obscenity, with respect to adults, in contexts other than public or commercial dissemination, the only context in which the State can demonstrate sufficient interest to justify regulation.

In addition to these First Amendment deficiencies, the statutory exemption of "daily or weekly newspapers," serving no compelling state interest, is a denial of equal protection of the laws. *Shapiro* v. *Thompson*, 394 U.S. 618 (1969).

The assumption of jurisdiction and grant of relief by the court below was consonant with the applicable principles fashioned by this Court. The Plaintiff chose an appropriate means to enforce his constitutional rights which were threatened by the existence of the Texas obscenity statute and the overbearing means chosen to enforce it. Indeed, this case demonstrates the vitality of *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965) and the remedies it contemplated. The lower court quite properly declined to abstain where, as here, the state statute was not fairly subject to an interpretation that would "avoid or modify the constitutional question," *Zwickler* v. *Koota*, 389 U.S. 241 (1967). In addition, the grant of injunctive relief against future prosecutions did not offend Section 2283 of Title 28, U.S.C. *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965); *Cameron* v. *Johnson*, 390 U.S. 611 (1968). The injunctive relief applied only to future prosecutions and did not inhibit the state from pursuing the pending prosecutions against the appellee. At the very least, declaratory relief was appropriate for it did not present the conflict with the state processes which may result from injunctive relief and, indeed, is required in a case such as this which involves an overbroad state statute impinging upon First Amendment freedoms.

ARGUMENT

I.

The Court below properly declared Article 527 unconstitutional.

The Attorney General's brief suggests a number of tantalizing problems for resolution (Appellants' brief, p. 18); this appeal, however, may be resolved without embarking upon such a full scale reexamination of obscenity and the First Amendment. Similarly, the questions presented may be answered without accepting the invitation to consider "curbing and curtailing" the freedom of speech and expression (Appellants' brief, p. 21).

a. *The Statute Punished Possession and Other Private Actions.*

The determination below was limited to "whether the statute is constitutionally defective on its face" (App. 85). The statute described the crime as follows:

> whoever shall knowingly photograph, act in, pose for, model for, print, sell, offer for sale, give away, exhibit, televise, publish, or offer to publish, or *have in his possession or under his control* . . . any obscene book, magazine, story, pamphlet, paper, writing, card, advertisement, circular, print, pictures, photographs, motion picture film, image, cast, slide, figure, instrument, statue, drawing, phonograph record, mechanical recording or presentation, or other article which is obscene . . . (emphasis added).

In light of *Stanley* v. *Georgia,* 394 U.S. 557 (1969), the Court was compelled to hold that "the above section is clearly unconstitutional in so far as it makes mere possession of obscene material a crime" (App. 85). The criminal charges against Stein, arising as they did in the context of possession, properly presented this aspect of the overbreadth of the Texas statute.

Stanley also persuaded the court that "in the context of 'private' expression [t]here is unlikely to be any legitimate state interest justifying regulation . . . " (App. 87). For this reason the Court concluded that the Texas law:

> . . . as a whole is overbroad in that it fails to confine its application to a context of public or commercial dissemination. In addition to proscribing the mere possession of obscene material, Section 1 states that 'whosoever shall knowingly photograph, act in, pose for . . . print' etc. without any limitation that such activities be engaged in publicly or with the intent to publicly or commercially distribute the materials involved (App. 88).

The statute obviously intruded into the realm of privacy protected by the *Stanley* rationale. Cf. *Redmond* v. *United States,* 384 U.S. 264 (1966).

b. *The Statute Was Not Limited to Material Utterly Without Redeeming Social Value.*

The trial court concluded that the Texas statute was also deficient in its failure to restrict its sanction to material "utterly without redeeming social value," noting that *Memoirs* v. *Massachusetts,* 383 U.S. 413 (1966) required

such a finding before the protection of the First Amendment could be breached (App. 90).

The Attorney General asks "whether measuring obscenity by *Roth*[4] is still constitutionally valid or whether *Memoirs* is a new standard" (Appellants' brief, p. 17). The short answer is that this Court in *Roth* was explicit: "all ideas having even the slightest redeeming social 'importance" enjoy the protection of the First Amendment and obscenity can be suppressed only because it is deemed to be "utterly without redeeming social importance," 354 U.S. 484-85. The opinion in *Memoirs* v. *Massachusetts*, 383 U.S. 413, does not appear to have departed from the *Roth* rationale but rather simply restates the governing principle. The *per curiam* opinion in *Redrup* v. *New York*, 386 U.S. 767 (1967) recognizes that a majority of the Court has adhered, albeit in separate opinions, "to a not dissimilar standard" holding:

> that a State may not constitutionally inhibit the distribution of literary material as obscene unless '(a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value,' emphasizing that the 'three elements must coalesce,' and that no such material can 'be proscribed unless it is found to be *utterly* without redeeming social value.' 386 U.S. at 770-71.

[4] *Roth* v. *United States*, 354 U.S. 476 (1957).

Faithful to this admonition, the court below struck the Texas statute for its failure to require that the prohibited material be "utterly without redeeming social value." The Court acted in a context which highlighted the necessity for such a limitation. Two police raids, reminiscent of *Stanford* v. *Texas*, 379 U.S. 476 (1965), were directed at the Plaintiff's residence, resulting in wholesale seizures of writing of all kinds, under the guise of enforcing the state obscenity statute. Neither the police responsible for the raids, nor the Assistant District Attorney who passed the opinion that the newspaper was obscene, nor the magistrate that issued the first warrant felt required to appraise the allegedly obscene material to determine whether it was "utterly without redeeming social value." The police officer and the District Attorney focused their attention on certain portions of a sixteen page newspaper (App. 64, 69, 70; Snider Deposition, pp. 55-58); the magistrate did not even see a copy of the newspaper before authorizing the search and seizure (App. 64-65). In absence of the requisite limitation, the statute was constitutionally deficient.

c. *The Statute Was Overbroad Because It Reached Beyond Public or Commercial Dissemination.*

The court below sought a synthesis between the opinions in *Roth* and *Stanley* concluding that the State could legitimately regulate obscenity with respect to adults only in the "context of public or commercial dissemination" (App. 88). This rationale is consistent with the view that it is only "obtrusive" obscenity that may legitimately be regulated by the State. See, Morreale, *Obscenity: An Analysis and Statutory Proposal*, 1969 Wis. L. Rev. 421, 449. It also harmonizes with the argument that obscenity can be banned "only when it creates a nuisance to others, when it

intrudes upon their own autonomous monitoring of their emotional and intellectual intake. . . . In solitude or in voluntary groups, in one's home or elsewhere, access to obscenity would be unimpaired so long as others are not brought into contact with obscenity against their will." *The Supreme Court 1968 Term*, 83 Harv. L. Rev. 7, 153 (1969). Such formulations, however, are not essential to sustain the lower court's action, which can be sustained on the narrow basis that the Texas statute punished mere private possession of obscene material.

d. The Statute Denied Equal Protection.

Even if the Texas statute were otherwise sound, its unlimited exemption of "any daily or weekly newspaper" (App. 80) is a clear denial of equal protection.

The Court below refused to "pass upon" this contention (App. 92). Nevertheless this infirmity would require invalidating the statute, certainly insofar as it applied to Stein, the publisher of a bi-monthly paper (App. 59). "Since the classification here touches on the fundamental right [of free press and speech], its constitutionality must be judged by the stricter standard of whether it promotes a *compelling* state interest." *Shapiro* v. *Thompson*, 394 U.S. 618, 22 L. Ed.2d at 617 (1969); *Williams* v. *Rhodes*, 393 U.S. 23 (1968). There is no conceivable, much less compelling, interest that justifies the exemption of daily and weekly newspapers and the application of the statute to bi-monthly papers.

II.

The plaintiff chose an appropriate means to enforce his constitutional rights.

> . . . wherever the Federal Courts sit, human rights under the Federal Constitution are always a proper subject for adjudication . . . *Zwickler* v. *Koota*, 389 U.S. 241, 248 (1967).

Stein's plight reaffirms both the validity and the necessity of the *Dombrowski*[5] principles. For defense in the state court of the pending criminal cases afforded no guarantee against repetition by the Dallas police of their unlawful raids. To await vindication in the state courts of Stein's rights would have assured a demise of the newspaper,[6] and a permanent chilling of free expression.

Stein was victimized by general searches of his personal possessions,[7] seizure of allegedly obscene newspapers without prior judicial review of the material,[8] and subjected to

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[5] *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965).

[6] A motion to suppress was presented in the first of the state criminal cases in February 1969, it was finally granted in October 1969. Defendant's motion to dismiss the second charge remains pending.

[7] Compare *Stanford* v. *Texas*, 379 U.S. 476 (1965). As police officer Monaghen testified (App. 74), "I didn't know what to seize and what not to seize so I just took everything."

[8] Compare *Marcus* v. *Search Warrant*, 367 U.S. 717 (1961). As previously noted, on the first search the magistrate issuing the warrant was not shown a copy of the allegedly obscene newspaper. On the second search the officers operating under the guise of a marijuana warrant seized allegedly obscene newspapers, posters and the typewriters, etc. that they considered to be instrumentalities of the crime (Snider Deposition 47).

arrest and prosecution under an overbroad state statute which impinged upon his First Amendment rights.[9] Stein suffered these abuses because of his publication of a newspaper which offended the Dallas authorities.

In the 18th century when "the King's messengers . . . ransacked Entick's home . . . and carted away quantities of his books and papers . . . . Lord Camden declared the warrant to be unlawful . . . 'His house is rifled; his most valuable secrets are taken out of his possession, before the paper for which he is charged is found to be criminal by any competent jurisdiction . . .'" *Stanford v. Texas*, 379 U.S. 476, 483-4 (1965). Stein's home was similarly "ransacked" twice within a two week period. Our society cannot tolerate such misuse of power for "[o]ur touchstones are that acceptable limitations must neither affect the impartial distribution of news and ideas . . . nor deprive our free society of the stimulating benefit of varied ideas because their purveyors fear physical or economic retribution solely because of what they choose to think and publish." *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 150-51 (1967).

d. The Court Properly Declined to Abstain.

The Attorney General's suggestion that Stein should have pursued some ephemeral state remedies[10] ignores the grav-

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[9] *See Stanley v. Georgia*, 394 U.S. 557 (1969). In fact the Dallas Police treated as obscene the use of "four (4) letter words" (App. 10, Snider Deposition 58), failing to distinguish between that which might offend and that which is prurient. See a timely opinion by Judge Aldrich in *Keefe v. Geanakos*, 418 F.2d 359 (1st Cir. 1969), making this essential distinction.

[10] The Attorney General departs from the record to assert "Stein could and should have sought . . . a dismissal of the charges in the state courts of Texas . . ." (Appellants' Brief, p. 29).

ity of the threat to Stein's right to publish and the public's right to receive. *Zwickler* v. *Koota* teaches us that the "judge-made doctrine of abstention . . . sanctions such escape only in narrowly limited 'special circumstances,'" 389 U.S. at 248. This judge-made doctrine of abstention is inappropriate in a challenge that a state statute is overbroad and is "not fairly subject to an interpretation which will avoid or modify the federal constitutional question." *Id.* at 251. Clearly abstention is not appropriate here for "cases involving vital questions of civil rights are the least likely candidates for abstention," *Wright* v. *McMann*, 387 F.2d 519, 525 (2d Cir. 1967), recognizing that the "objectives of the Civil Rights Act" would be defeated if claims under the Constitution "would have to stagnate in the federal court until some nebulous remedy was pursued like a will-o-the-wisp in the state court." *Ibid.*; see *Kirkland* v. *Wallace*, 403 F.2d 413 (5th Cir. 1968). Inasmuch as abstention "operates to require piecemeal adjudication" the result is "quite costly" where, as here, "the state statute may inhibit the exercise of First Amendment freedoms." *Baggett* v. *Bullitt*, 377 U.S. 360, 378-9 (1964). Finally, the "abstention doctrine is inappropriate for cases . . . where . . . statutes are justifiably attacked on their face as abridging free expression or as applied for the purpose of discouraging protected activities," *Dombrowski* v. *Pfister*, 380

Inasmuch as the matter has been raised we would like to put it to rest. A motion to suppress evidence and to dismiss the charge was filed, presented and briefed in 68-3977-C in the County Criminal Court No. 3 of Dallas County, Texas in February, 1969. Finally on October 16, 1969 the motion to suppress was granted and the case was dismissed. The second criminal charge remains pending in the Dallas County Criminal Court on defendants' motion to dismiss. To date we have not been advised of any action on the motion.

U.S. 479, 489-90 (1965). See generally, *The Chilling Effect in Constitutional Law*, 69 Colum. L. Rev. 808 (1969).

Finally, "the doctrine [of abstention] contemplates that deference to state court adjudication only be made where the issue of state law is uncertain." *Harman* v. *Forssenius*, 380 U.S. 528, 534 (1965), quoted with approval in *Reetz* v. *Vozanich*, No. 185, Oct. Term 1969, slip op. 4, decided February 25, 1970. In the present case there was no uncertainty as to the state statute which on its face punished mere possession of obscenity and had been so construed by the Texas appellate court. *Sullivan* v. *State*, 401 S.W.2d 246 (Tex. Crim. App., 1966).

b. *Injunctive Relief Against Future Arrests and Prosecution Was Appropriate.*

The lower court simply enjoined future arrests or prosecutions under the invalid Texas obscenity statute. It did not purport to prevent the state from pressing the pending prosecutions.

Federal injunctions against unconstitutional police conduct were approved as early as 1939, *Hague* v. *CIO*, 307 U.S. 496 (1939), see generally, *The Federal Injunction as a Remedy for Unconstitutional Police Conduct*, 78 Yale L. J. 143 (1968). The federal "courts have the power to enjoin unconstitutional police practices. They are not always required to await criminal trials which may never materialize in order to vindicate crucial constitutional rights," *Gomez* v. *Layton*, 394 F.2d 764, 766 (D.C. Cir., 1968); *Wolin* v. *Port of New York*, 392 F.2d 83 (2d Cir., 1968), *cert. denied*, 393 U.S. 940.

Federal injunctions against state prosecutions date back to the "fountainhead" of *Ex Parte Young*, 209 U.S. 123

(1908). No statute bars injunctive relief against future prosecutions, for 28 U.S.C. Section 2283 "only bars stays of suits already instituted," *Dombrowski* v. *Pfister*, 380 U.S. 479, 484, n. 2 (1965) and "restraints upon future prosecutions are beyond the reach of 2283" *Baines* v. *City of Danville*, 337 F.2d 579, 595 (4th Cir., 1964), *cert. denied*, 381 U.S. 939.

Stein's uncontroverted affidavit in support of summary judgment asserted an intention to continue publication of the "Dallas Notes" and "to continue to include in the newspaper material similar to that contained in the previous issues . . . which have been characterized by the Dallas police, the District Attorney's office, as constituting obscenity in violation of Article 527 . . ." (App. 61). Stein's pleadings alleged a fear of future arrests and prosecutions under Article 527 (App. 37), a manifestly reasonable apprehension in light of his experience with the Dallas authorities. The State expressed no willingness to change its future treatment of Stein. On these facts the Court properly enjoined future arrests and prosecutions under the Texas statute, a statute which is admittedly overbroad, and trenches upon protected constitutional freedoms. Not only did the trial court have before it the "facially" unconstitutional statute but the "gloss" of police enforcement of the statute in a manner that could not be tolerated. If *Dombrowski* has two branches[11] or but a single strand it

[11] *The Chilling Effect in Constitutional Law*, 69 Colum. L. Rev., 809, 813 (1969). "This holding has two branches. Under the first, whether a federal court will hear a suit for declaratory or injunctive relief depends on whether the statute is unconstitutional on its face. . . . Once the law is deemed unconstitutional on its face, the issues of bad faith and threatened prosecution should be irrelevant. . . . Under the second branch of the *Dombrowski*

does not matter. The circumstances of this case satisfy all requisites for injunctive relief. The Texas obscenity statute was properly challenged as "overly broad and vague regulations of expression," *Cameron* v. *Johnson*, 390 U.S. 611, 618 (1968). In addition, although the court below did not feel it essential to its determination (App. 85), evidence abounds that the Dallas police misused this statute to suppress a disfavored newspaper and harass its publisher.[12] Plaintiff Stein "justifiably attacked [Article 527 on its] face as abridging free expression, [and/] or as applied for the purpose of discouraging protected activities." *Dombrowski* v. *Pfister*, 380 U.S. 479, 490 (1965).

In light of the continued threat of future arrests and prosecutions under Article 527, and recognizing that "[t]he threat of sanctions may deter . . . almost as potently as the actual application of sanctions," *NAACP* v. *Button*, 371 U.S. 415, 433 (1963), the prophylactic effect of injunctive relief was not only warranted but required. For where, as here, "the institutional interests in comity collide with the paramount institutional interests protected by the First Amendment, comity must yield." *Machesky* v. *Bizzell*, 414

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holding, whether a federal court will hear a suit for declaratory or injunctive relief depends on whether a *valid* statute is used for the purpose of discouraging protected activities."

[12] Both searches were carried out at night, all persons on the premises were arrested on both occasions, virtually everything on the premises including newspapers, typewriters and personal property were seized on both occasions without the slightest justification. Thus according to Officer Snider, when the officers came back on the second raid and found Stein back in publication they "cleaned house again" (App. 72); as Officer Monaghen put it in explaining why he seized a poster of Mao Tse-tung, "I didn't know what to seize and what not to seize so I just took everything," (App. 74).

F.2d 283, 291 (5th Cir., 1969); *Sheridan* v. *Garrison,* 415 F.2d 699 (5th Cir., 1969).

c. *The Declaratory Relief Was Proper.*

If the trial court correctly enjoined future arrests and prosecutions under Article 527, assuredly the declaratory judgment invalidating the statute was in order. However, even if the trial court erred in granting injunctive relief, the declaratory judgment was proper.[13] For a "request for a declaratory judgment that a state statute is overbroad on its face must be considered independently [and] . . . . a federal district court has the duty to decide the appropriateness and the merits of the declaratory request irrespective of its conclusion as to the propriety of the issuance of the injunction." *Zwickler* v. *Koota,* 389 U.S. 241, 254 (1967).

The standards that govern the availability of declaratory relief are significantly less stringent than those that determine the propriety of an injunction against enforcement of a state statute. An action "for declaratory relief . . . involves none of the dangers to which Congress was addressing itself" in enacting Sections 28 U.S.C. §§2282 and 2283. *Kennedy* v. *Mendoza-Martinez,* 372 U.S. 144, 155 (1963). Declaratory relief alone would have left the state of Texas "free to continue to apply the statute," pending final review of the trial court's order. *Ibid.* The considerations of comity that militate against use of injunctive relief are not persuasive as to declaratory relief, for in adopt-

[13] Apparently the Attorney General does not question the propriety of the declaratory judgment as a procedural matter. At least we find no suggestion in its brief that declaratory relief was not in order, if one assumes the Texas statute was unconstitutional.

ing the declaratory judgment act Congress specifically recognized that "much of the hostility to the extensive use of the injunction power by the Federal Courts will be obviated by enabling the Courts to render declaratory judgments," *Sen. Rep.* 1005, 73rd Cong. 2d Sess. (1934).

Clearly Section 2283 does not prohibit the granting of declaratory relief, nor do principles of comity otherwise inhibit the use of declaratory relief under such circumstances. Implicit in this Court's opinion in *Cameron* v. *Johnson*, 390 U.S. 611, 615 (1968) is the recognition that declaratory relief with respect to the constitutionality of a state criminal statute may be available in the federal court despite the pendency of prosecutions under the statute. See *Kirkland* v. *Wallace*, 403 F.2d 413, 415 (5th Cir. 1968). Unless declaratory relief is available under such circumstances, it may not be otherwise available. Once pending criminal charges are dismissed there may no longer exist an adversary "controversy" of sufficiently substantial nature to satisfy the statutory requisites. *Golden* v. *Zwickler*, 394 U.S. 103 (1969); *Fenster* v. *Leary*, 264 F. Supp. 153 (S.D.N.Y. 1966), *aff'd* 386 U.S. 10. In absence of a pending prosecution or the immediate threat thereof, there is thus no "concrete fact situation" and declaratory relief is unavailable because of the court's unwillingness to issue an "advisory opinion." *Zemel* v. *Rusk*, 381 U.S. 1, 20 (1965). While the criminal charges are pending, declaratory relief is appropriate for all the statutory requisites exist, i.e. "defined rights and a definite threat to interfere with a possessor of the menaced rights by a penalty for an act done in violation of the claimed restraint." *United Public Workers* v. *Mitchell*, 330 U.S. 75, 92 (1947).

CONCLUSION

Appellee respectfully submits that the decision of the trial court should be affirmed.

Respectfully submitted,

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March 3, 1970

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IN THE

Supreme Court of the United States

October Term, [redacted] 1970

No. [redacted] 41

CHARLES BATCHELOR, Chief of Police, City of Dallas; T. C. SNIDER, V. D. MONAGHAN, R. D. ROGERS, and HENRY WADE, District Attorney, Dallas County,

Appellants,

vs.

BRENT STEIN,

Appellee.

On Appeal From the District Court for the Northern District of Texas.

Motion for Leave to Participate in the Oral Argument by Stanley Fleishman, Esq., as Amicus Curiae in Support of Appellee.

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IN THE

Supreme Court of the United States

October Term, 1969
No. 565

CHARLES BATCHELOR, Chief of Police, City of Dallas; T. C. SNIDER, V. D. MONAGHAN, R. D. RODGERS, and HENRY WADE, District Attorney, Dallas County,

Appellants,

vs.

BRENT STEIN,

Appellee.

On Appeal From the District Court for the Northern District of Texas.

Motion for Leave to Participate in the Oral Argument by Stanley Fleishman, Esq., as Amicus Curiae in Support of Appellee.

Mel S. Friedman, Esq., and Stanley Fleishman, Esq., amici curiae on behalf of appellee, respectfully move that leave be granted to Stanley Fleishman to participate in the oral argument as amicus curiae in support of appellee. A brief amici curiae by the said Mel S. Friedman and Stanley Fleishman, on behalf of appellee, has heretofore been filed with the court with the consent of all the parties to the cause.

1. The interest of amici in this case arises from the fact that they are counsel in a profusion of cases, over three hundred in number, in federal and state

courts throughout the United States involving the same constitutional issue before the court in this case, namely, whether it is constitutionally permissible for a State to punish the dissemination of allegedly obscene material to adults, in the light of the free speech and press, due process, and equal protection provisions of the First and Fourteenth Amendments to the United States Constitution. A summary of the pending cases, both civil and criminal, is annexed as an appendix to this motion.

The specific case herein involves a single publisher of an underground bi-weekly newspaper. Amici represent a multifold number of producers, distributors and exhibitors of motion picture films, and a broad and diversified number of publishers, distributors, wholesalers and retailers of books, magazines, and other related media of communication. The interest of these persons in the constitutional issue involved in the case herein is, therefore, substantial.

The cases in which amici are involved, where the same issue is presented, are pending in Arizona, California, Hawaii, Missouri, North Dakota, Ohio, Oregon, Tennessee, Texas and Washington. The interest of the community is, therefore, also meaningfully involved in the case herein.

2. Amici believe that oral argument will provide assistance to the court, not otherwise available. The formulation of standards and criteria, relative to the dissemination of material dealing with sex and nudity to adults, by the court, involves considerations reaching beyond the particular concrete situation presented in the case herein. There is need for the court to know, it is submitted, the operation and effect of obscenity stat-

utes and their impact upon the exercise of freedoms of speech and press by the adult community throughout the United States. Oral argument would offer the opportunity to present to the court essential facts, important data, and empirical evidence; as well as a summary of diversified experiences which bear importantly upon the substantial constitutional question presented to the court. The argument would inform the court with respect to the chilling effect of obscenity statutes upon the circulation of constitutionally protected material to adults. There is also probative data available that obscenity statutes for adults necessarily lend themselves to arbitrary, discriminatory and selective enforcement. The information and evidence which amicus is prepared to furnish the court on oral argument will, it is submitted, be fruitful, illuminating and helpful to the court in determining the substantial constitutional issue presented in the case.

WHEREFORE, amici respectfully pray that the motion for leave to participate in the oral argument by Stanley Fleishman, as amicus curiae, be granted, and that the court allot such time for oral argument as may seem proper.

Dated: March 4, 1970.

Respectfully submitted,

STANLEY FLEISHMAN,
Amicus Curiae.

MEL S. FRIEDMAN,
Amicus Curiae.
Amici Curiae, Movants.

APPENDIX.

Pending Cases Involving Constitutionality of Obcenity Statutes Proscribing Dissemination of Material to Adults.

FEDERAL CASES

Arizona

Grove Press, Inc., v. Mummert, et al., U.S.D.C. D.C. Ariz., No. Civ. 69-503 Phx. (three-judge court).

California

United States v. 77 Cartons of Magazines, etc., U.S. Court of Appeals for the Ninth Circuit, No. 24676.

Three-judge court:

Luros v. Younger, et al., U.S.D.C. C.D. Calif., No. 69-432-IH;

World News, Inc., v. Davis, et al., U.S.D.C. C.D. Calif., No. 69-2477-IH;

Grove Press, Inc., v. Bergna, et al., U.S.D.C. N.D. Calif., No. 52300;

Grove Press, Inc. v. Lynch, et al., U.S.D.C. E.D. Calif., No. F-383 Civ.;

United States v. Thirty-Seven (37) Photographs, U.S.D.C. C.D. Calif., Civ. No. 69-2242-F.

Single-judge court:

Grove Press, Inc., v. Younger, et al., U.S.D.C. C.D. Calif., No. 69-2554-FW;

Alegret v. Arnebergh, et al., U.S.D.C. C.D. Calif., No. 70-170-ALS;

Falzett v. Davis, et al., U.S.D.C. C.D. Calif., No. 70-78-R.

Hawaii

Lee, et al., v. Sheater, et al., U.S.D.C. D.C. Hawaii, Civ. No. 3012.

Missouri

United States v. Lang, et al., U.S.D.C. W.D. Mo., No. 23038-4.

North Dakota

United States v. Spinar, et al., U.S.D.C. D.C. N.D., Crim. No. 9292.

Ohio

United States v. Linetsky Products, Inc., et al., U.S.D.C. S.D. Ohio, W.D., Crim. No. 11364.

Oregon

Hayse, et al., v. Van Hoomissen, et al., U.S.D.C. D.C. Ore., Civ. No. 69-743 (three-judge court).

Tennessee

ABC Books, et al., v. Benson, et al., U.S.D.C. M.D. Tenn., Nashville, Civ. No. 5528 (three-judge court).

Texas

Three-judge court:

Gholson, et al., v. Short, et al., U.S.D.C. S.D. Tex., Houston Div., No. CA-68-H-1005;

Newman, et al., v. Connover, et al., U.S.D.C. N.D. Tex, Dallas Div., No. CA-3-3134;

Texas Bookmark Corp., et al., v. Curtis, et al., U.S.D.C. N.D. Tex., Amarillo Div., No. CA-2-793;

West v. Cherry, et al., U.S.D.C. N.D. Texas, Lubbock Div., No. CA-5-694;

Texas Bookmark Corp. v. Cherry, et al., U.S.D.C. N.D. Tex., Lubbock Div., No. CA-5-695;

West, et al., v. Short, et al., U.S.D.C. S.D. Tex., Houston Div., No. CA-69-H-999;

Wimberly, et al., v. Calvert, et al., U.S.D.C. W.D. Tex., Waco Div., No. W-69-CA-56.

Washington

Grove Press, Inc., v. Brockett, et al., U.S.D.C. E.D. Wash. N.D., No. 3300 (three-judge court).

* * * * * *

STATE CASES

California

(Books, magazines, etc., and films other than "I Am Curious-Yellow")

People v. Luros, et al., Supreme Court of California, Crim. No. 13153.

People v. Sayles, et al., Appellate Department of Superior Court of California, County of Los Angeles, No. CR. A-8710.

World News, Inc., v. Davis, et al., Superior Court for the County of Los Angeles, No. 965366.

People v. Chapman, et al., No. 31592, and 106 other separate cases variously numbered from 337520 to 659929, in the Municipal Court for the Los Angeles Judicial District;

People v. Goulet, No. 93175, and 3 other separate cases variously numbered from 94350 to 094558, in the Municipal Court for the Pasadena Judicial District;

People v. Marsh, No. 24396, and 7 other separate cases variously numbered from 24584 to 24610, in the Municipal Court for the Beverly Hills Judicial District;

People v. Baker & Furnari, No. 69800, Municipal Court for the Citrus Judicial District;

People v. Furnari, No. 55738, Municipal Court for the El Monte Judicial District;

People v. Rockford, No. 91684, and 2 other separate cases in the Municipal Court for the Long Beach Judicial District;

People v. Arleo, No. 57104, Municipal Court for the Inglewood Judicial District;

People v. Jones, et al., No. 24203 Municipal Court for the Santa Anita Judicial District;

People v. Johnson, et al., No. 118393 Municipal Court for the Central Orange County Judicial District;

People v. Miranda, et al., No. ....., Municipal Court for the Alameda Judicial District;

People v. Chapman, No. 12662, Municipal Court for the Fremont-Newark Judicial District;

People v. Topel, No. 77216, and 6 other separate cases variously numbered from 80698 to 82420, in the Municipal Court for the San Diego Judicial District.

("I Am Curious-Yellow")

People v. Kappas, No. 351946, and 4 other separate cases variously numbered from 351947 to 351984, in the Municipal Court for the Los Angeles Judicial District;

People v. Baffa, No. 32982, and 3 other separate cases in the Municipal Court for the Glendale Judicial District;

People v. Loews Theatre Corp., No. 57864, Municipal Court for the Inglewood Judicial District;

People v. Shepard, et al., No. 102284, and 19 other separate cases variously numbered from 102250 to 102604, in the Municipal Court for the South Bay Judicial District;

People v. United Artists Theatre, No. 93010, and 42 other separate cases variously numbered from 93195 to 93213, in the Municipal Court for the Long Beach Judicial District;

People v. Alford, et al., No. 53307, Municipal Court for the Harbor Judicial District;

People v. Meyer, et al., No. 31730, Municipal Court for the West Orange County Judicial District;

People v. St. Onge, No. 45530, Municipal Court for the Merced County Judicial District;

People v. Shaw International Theatres, Inc., No. 13024-A, Municipal Court for the San Jose-Milpitas Judicial District.

APPELLEE'S BRIEF

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1970

No. 41

DYSON, CHIEF OF POLICE, CITY OF DALLAS, et al.,
Appellants,

v.

BRENT STEIN,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

APPELLEE'S BRIEF ON REARGUMENT

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IN THE
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DYSON, CHIEF OF POLICE, CITY OF DALLAS, et al.,
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BRENT STEIN,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

APPELLEE'S BRIEF ON REARGUMENT

The Court in its notation in *Perez v. Ledesma*, No. 60, October term, 1970, requested in that case brief and argument on the propriety of declaratory relief. For fear that our initial brief did not adequately treat this question in our own case, we tender for consideration this Brief on Reargument.

STATEMENT OF THE CASE

Plaintiff's Complaint (App. 30-1) alleged a cause of action on behalf of the Plaintiff Stein, publisher of the "Dallas Notes" and on behalf of a class "composed of present and future employees of and contributors to the 'Dallas Notes' and persons engaged in the distribution of the 'Dallas Notes' . . ." The Complaint sought, in addition to injunctive relief, judgment declaring the Texas obscenity statute unconstitutional, alleging that Plaintiff "wishes to continue publication and distribution of the 'Dallas Notes' with content of a nature similar to that which has exposed him to arrest and prosecution in the past. Plaintiff fears future arrest and prosecution under Article 527 unless his rights thereunder are declared by this Court" (App. 37).

Plaintiff's uncontroverted affidavit (App. 61) in support of summary judgment alleged an "intention to continue publication of the 'Dallas Notes' in Dallas County, Texas and . . . to include in the newspaper material similar to that contained in the previous issues of the 'Dallas Notes' which have been characterized by the Dallas police, (sic) the District Attorney's office as constituting obscenity in violation of Article 527 of the Penal Code of the State of Texas."

The Court's memorandum opinion concluded that Plaintiff was entitled to declaratory and injunctive relief. From the judgment entered in accordance with the Court's opinion, Defendant has perfected this appeal.

ARGUMENT

Congress intended that declaratory relief would be available to determine the constitutionality of state criminal statutes. The Senate Judiciary Committee report on the bill concluded:

> "Finally, it may be said that the declaratory-judgment procedure has been molded and settled by thousands of precedents, so that the administration of the law has been definitely clarified. The Supreme Court mentioned one of its principal purposes in *Terrace v. Thompson* . . . when it said: 'They are not obligated to take the risk of prosecution, fines, and imprisonment and loss of property in order to secure an adjudication of their rights.' " *Sen. Rep.* 1005, p. 6, 73rd Cong. 2d Sess., (1934).

In *Terrace* the Supreme Court had affirmed the grant of federal injunction against a state prosecution, holding:

> "Equity jurisdiction will be exercised to enjoin the threatened enforcement of a state law which contravenes the federal Constitution wherever it is essential in order effectually to protect property rights and the rights of persons against injuries otherwise irremediable . . ." *Terrace v. Thompson,* 263 U.S. 197, 214 (1923).

It seems equally clear that declaratory relief is appropriate in many instances when injunction is not, for while "there are similarities between injunctions and declaratory judgments, there are also important differences," *Mitchell v. Donovan,* U.S. , 90 S. Ct. 1763, 1765 (1970). Principal among these differences is that declaratory relief "involves none of the dangers to which Congress was addressing itself" in enacting 28 U.S.C., Sections 2281 and 2282. *Kennedy v. Mendoza-Martinez,* 372 U.S. 155 (1963), and a "court may grant declaratory relief even though it chooses not to issue an injunction . . ." *Powell v. McCormack,* 395 U.S. 486, 499 (1969).

Assuming then that declaratory relief in the federal courts is an appropriate means of testing the constitutionality of state criminal statutes, and recognizing that declaratory relief is significantly less disruptive than injunctive relief, does the

pendency of a prosecution under the state's criminal statute preclude resort to federal declaratory relief?

The facts of the present case amply justify the lower court's use of declaratory relief. This is not a case in which the Plaintiff sought to preempt pending state prosecutions by resort to the federal forum. Rather, the Plaintiff was engaged in the regular publication of a newspaper. The previous arrests by the Dallas Police, and the pending prosecutions, strongly and clearly implied the threat of future arrests and prosecutions under the Texas obscenity statute. Plaintiff's federal action was addressed to these future threats[1]. There was no likelihood that the pending prosecutions would dispose of the controversy: the constitutional issues had already been unfavorably decided by the Texas courts,[2] and acquittal on the pending criminal cases would be no guard against future charges as to other issues of the newspaper.

Congress contemplated that federal declaratory relief would be appropriate under similar circumstances. The Senate Judiciary Committee cited as justification for the enactment of the federal declaratory judgment statute the Tennessee decision in *Erwin Billiard Parlor v. Buckner*, 156 Tenn. 278, 300 S.W. 565 (1927). *Sen. Rep.* 1005, p. 3, 73rd Cong., 2d Sess. (1934). In *Erwin Billiard* the Tennessee Supreme Court had approved the grant of declaratory relief at the behest of pool hall operators who had been "served with notice by the Sheriff that he would procure warrants against them and close their places of business and continue to prosecute them for every separate offense committed by them contrary to the provisions of said statute. . ." Relief had been sought by the Plaintiffs against the

[1] Injunctive relief was sought only as to any future prosecution, pending prosecutions were specifically excluded from the prayer for relief (App. 77).

[2] The Texas Court of Criminal Appeals had held that the statute's exemption of daily and weekly newspapers was neither unreasonable nor arbitrary, *Carter v. State*, 388 S.W. 2d 191 (Tex. Crim. App., 1965); and had upheld conviction for possession of obscene material, *Sullivan v. State*, 401 S.W. 2d 246 (Tex. Crim. App., 1966).

Sheriff, the foreman of the grand jury and the District Attorney General. Stein certainly stands as well as the Tennessee pool hall proprietors in seeking declaratory relief.

Declaratory relief has traditionally been considered available to business institutions facing threats similar to that confronting Stein:

> "The fact that the plaintiff in a declaratory proceeding has already been subjected to a criminal prosecution, which is pending at the time that the declaratory proceeding is initiated, would not in any manner militate against the right to obtain, or the court to grant, a declaratory judgment, with respect to the plaintiff's rights under the law he is charged with having violated, and to clarify such rights, the declaratory action is brought, if such criminal prosecution involves a property right or right to engage in a business or a profession." Anderson, *Actions for Declaratory Judgment*, Section 731, at 1572 (Harrison Company, Atlanta, Ga., 1951); see *Watson v. Centro Espanol de Tampa*, 30 S. 2d 288 (S. Ct. Fla. 1947); *Ostrander v. Linn*, 22 N.W. 2d 223 (S. Ct. Iowa, 1946).

CONCLUSION

Appellee respectfully submits that the three-judge court below did not abuse its discretion in granting declaratory relief.

Respectfully submitted,

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DYSON, CHIEF OF POLICE OF DALLAS, ET AL. *v.* STEIN

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

No. 41. Argued April 30, 1970—Reargued November 16, 1970—Decided February 23, 1971

Appellee newspaper publisher, who had been charged with violating a Texas law prohibiting the possession of obscene materials, brought this action in a federal district court for an injunction to prevent the Dallas police from arresting him and seizing his property on obscenity grounds without a prior judicial determination of obscenity and for a declaration of the rights of the parties with respect to the statute. A three-judge court was convened and issued declaratory and injunctive relief, holding two parts of the statute unconstitutional and ruling that another part would be constitutional only if the obscenity definition was changed. *Held:* There was no finding of irreparable injury to appellee and hence no proper basis for federal interference with the pending state criminal prosecution. *Younger* v. *Harris, ante,* p. 37; *Samuels* v. *Mackell, ante,* p. 66.

300 F. Supp. 602, vacated and remanded.

Lonny F. Zwiener, Assistant Attorney General of Texas, argued the cause for appellants on the original argument and on the reargument. With him on the brief were *Crawford C. Martin,* Attorney General, *Nola White,* First Assistant Attorney General, *Pat Bailey,* Executive Assistant Attorney General, *Robert C. Flowers,* Assistant Attorney General, *Henry Wade, pro se, Wilson Johnston, N. Alex Bickley, Thomas B. Thorpe,* and *Preston Dial.*

David R. Richards argued the cause for appellee on the original argument and on the reargument. With him on the briefs was *Melvin L. Wulf.*

Stanley Fleishman filed a brief *pro se* et al. as *amici curiae* urging affirmance.

PER CURIAM.

The appellee, Stein, published a bi-weekly newspaper, the Dallas Notes. Stein was charged with two violations of Art. 527, § 1, of the Texas Penal Code, which then prohibited, among other things, the possession of obscene materials.* While these two cases were pending

*Texas Penal Code, Art. 527, 1961 Tex. Gen. Laws, c. 461, § 1, provided:

"Section 1. Whoever shall knowingly photograph, act in, pose for, model for, print, sell, offer for sale, give away, exhibit, televise, publish, or offer to publish, or have in his possession or under his control, or otherwise distribute, make, display, or exhibit any obscene book, magazine, story, pamphlet, paper, writing, card, advertisement, circular, print, pictures, photograph, motion picture film, image, cast, slide, figure, instrument, statue, drawing, phonograph record, mechanical recording, or presentation, or other article which is obscene, shall be fined not more than One Thousand Dollars ($1,000) nor imprisoned more than one (1) year in the county jail or both.

"Sec. 2. Whoever shall knowingly offer for sale, sell, give away, exhibit, televise, or otherwise distribute, make, display, or exhibit any obscene book, magazine, story, pamphlet, paper, writing, card, advertisement, circular, print, pictures, photograph, motion picture film, image, cast, slide, figure, instrument, statue, drawing, phonograph record, mechanical recording, or presentation, or other article which is obscene, to a minor shall be fined not more than Two Thousand, Five Hundred Dollars ($2,500) nor imprisoned in the county jail more than two (2) years or both.

"Sec. 3. For purposes of this article the word 'obscene' is defined as, whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests. Provided, further, for the purpose of this article, the term 'contemporary community standards' shall in no case involve a territory or geographic area less than the State of Texas.

"Sec. 4. Whoever shall be convicted for the second time of a violation of this article shall be deemed guilty of a felony and shall be punished by confinement in the State penitentiary for not more than five (5) years or by a fine of not more than Ten Thousand Dollars ($10,000) or by both such fine and imprisonment.

"Sec. 5. It shall be a defense to any charges brought hereunder if such prohibited matter or act shall be regularly in use in any

in state courts, Stein brought the present action in a federal district court under 42 U. S. C. §§ 1983, 1985, representing himself and a class consisting of present and future employees of and contributors to his newspaper. The defendants were the district attorney of Dallas County, and the Dallas chief of police. He sought:

> "[P]ermanent injunctive relief against the Dallas Police Department, requiring that . . . there be no arrest of plaintiff, nor seizure of his property on grounds of obscenity without a prior judicial determination of the obscene character of the material in question; . . .
>
> ". . . That the Court adjudge, decree and declare the rights of the parties with respect to the application of Article 527 of the Texas Penal Code;
>
> ". . . That the Court grant such other and further relief as is just and equitable."

A three-judge court was convened. 28 U. S. C. § 2284. That court refused to require a hearing on the

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bona fide, religious, educational or scientific institution or the subject of a bona fide scientific investigation.

"The provisions of this Act shall not apply to any motion pictures produced or manufactured as commercial motion pictures which (1) have the seal under the Production Code of the Motion Picture Association of America, Inc.; or (2) legally move in interstate commerce under Federal Law; or (3) are legally imported from foreign countries into the United States and have been passed by a Customs Office of the United States Government at any port of entry.

"The provisions of this Act shall not apply to any daily or weekly newspaper.

"Sec. 6. The district courts of this State and the judges thereof shall have full power, authority, and jurisdiction, upon application by any district or county attorney within their respective jurisdictions, to issue any and all proper restraining orders, temporary and permanent injunctions, and any other writs and processes appropriate to carry out and enforce the provisions of this Act."

obscene character of the material before its seizure and the arrest of the plaintiff. It held that the request for such relief was "based on the alleged harassment and . . . not an attack upon the constitutionality of a statute." The court went on to emphasize that its consideration did "not in any way involve an appraisal of the constitutionality of the application of Article 527 to Plaintiff. Our sole concern is the determination of whether the statute is constitutionally defective on its face." The three-judge court then turned to the statute itself, and held that §§ 1 and 2 were unconstitutional, and that § 3 would be constitutional only if the definition of obscenity were changed somewhat. The court issued appropriate declaratory and injunctive relief effectuating its conclusions. 300 F. Supp. 602 (1969). Texas officials appealed, and we noted probable jurisdiction. 396 U. S. 954 (1969).

Today we have again stressed the rule that federal intervention affecting pending state criminal prosecutions, either by injunction or by declaratory judgment, is proper only where irreparable injury is threatened. *Douglas* v. *City of Jeannette*, 319 U. S. 157 (1943). The existence of such injury is a matter to be determined carefully under the facts of each case. In this case the District Court made no findings of any irreparable injury as defined by our decisions today; therefore, the judgment of the District Court is vacated and the case is remanded for reconsideration in light of *Younger* v. *Harris*, *ante*, p. 37, and *Samuels* v. *Mackell*, *ante*, p. 66. See also *Boyle* v. *Landry*, *ante*, p. 77.

It is so ordered.

MR. JUSTICE WHITE concurs in the result.

[For concurring opinion of MR. JUSTICE STEWART, see *ante*, p. 54.]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, concurring in the result.

My Brother DOUGLAS' dissenting opinion describes graphically the police conduct upon which appellee rested his allegations of bad faith and harassment. If proved, these allegations would justify federal intervention. The mass seizure of some two tons of the issues of the newspaper without a prior judicial determination of the alleged obscenity of the issues was unconstitutional. *Marcus* v. *Search Warrant*, 367 U. S. 717 (1961); *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58 (1963); *A Quantity of Books* v. *Kansas*, 378 U. S. 205 (1964). Similarly, the mass seizure of the tools and equipment required to prepare the newspaper—insofar as it disabled appellee from publishing future issues—infringed the principle of *Near* v. *Minnesota*, 283 U. S. 697 (1931).

But these questions are not before us. The three-judge court below remanded to a single judge for determination all questions advanced by appellee except the contention that the Texas statute was unconstitutional on its face, and the appellee does not challenge this order of remand here. I, therefore, would reverse the judgment of the District Court, except for paragraph 4, for the reasons stated in my separate opinion in *Perez* v. *Ledesma*, *ante*, p. 93.

MR. JUSTICE DOUGLAS, dissenting.

I

The two raids in this case were search-and-destroy missions in the Vietnamese sense of the phrase. In each case the police came at night. The first search warrant authorized a search and seizure of "obscene articles and materials, to-wit: pictures, photographs, drawings and obscene literature" concealed at a given

address. The seizures included: two tons of a newspaper (Dallas Notes), one photograph enlarger, two portable typewriters, two electric typewriters, one camera, "numerous obscene photographs," and $5.43 in money.[1] The second warrant was issued 16 days later, in response to a claim that marihuana was concealed on the premises. It authorized the officers "to search for and seize the said narcotic drug and dangerous drug in accordance with the law in such cases provided." Not finding any marihuana on the premises, the sergeant asked instructions from his lieutenant. He was told to seize pornographic literature and any equipment used to make it. He "didn't know what to seize and what not to seize so [he] just took everything." "Everything" included a Polaroid camera, a Kodak Brownie, a Flocon camera, a Kodak lamp, a floating fixture lamp, a three-drawer desk containing printers' supplies, a drafting square, a drafting table, two drawing boards, a mailing tube, two telephones, a stapler, five cardboard boxes containing documents, one electric typewriter, and one typewriter desk. A poster of Mao Tse-tung, credit cards, costume jewelry, cans of spices, a brown sweater, and

[1] This indiscriminate seizure is hardly surprising since none of the officers knew what to seize, as the questioning of the lieutenant in charge of the raid shows:

"Q. What instructions did you give the officers in effecting this search and seizure as to what they were to do?

"A. They were to search for any obscene material they could find. All of our officers know what obscene material is.

"Q. What is obscene material?

"A. Well, I wish you hadn't ask [*sic*] that. I take that back. They don't know, neither do I.

"Q. What instructions had you given them in terms of what they were to do?

"A. To search for obscene material and seize it.

"Q. What definition, if any, did you give them as to obscene material?

"A. I didn't."

a statue of a man and woman in an embrace were also seized. Thus the newspaper Dallas Notes, a bi-monthly, was effectively put out of business.[2]

It would be difficult to find in our books a more lawless search-and-destroy raid, unless it be the one in *Kremen* v. *United States*, 353 U. S. 346. If this search-and-destroy technique can be employed against this Dallas newspaper, then it can be done to the New York Times, the Washington Post, the Seattle Post Intelligencer, the Yakima Herald-Republic, the Sacramento Bee, and all the rest of our newspapers. For, as I shall point out, the Texas statute governing "obscenity"[3] is plainly unconstitutional.

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[2] Appellee Stein has since reached an agreement with the Dallas Police Department by which they returned most of the property to him in return for his execution of an Indemnity and Release Agreement. The binding effect of such an agreement, which required Stein to choose between the return of his property so that he could continue publishing, and assertion of his civil rights under such provisions as 42 U. S. C. § 1983, is not at issue here.

The Dallas Police Department still holds "film negatives, eight or ten photographs, one movie advertisement poster, one litho copy of paper, and a representative number of back issues of paper entitled 'Dallas Notes' or 'Notes from the Underground.'"

[3] Article 527 defined "obscene" as follows in § 3:

"[W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests. Provided, further, for the purpose of this article, the term 'contemporary community standards' shall in no case involve a territory or geographic area less than the State of Texas."

After the three-judge court decision, Article 527 was amended to define "obscene" as "material (a) the dominant theme of which, taken as a whole, appeals to a prurient interest; (b) which is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) which is utterly without redeeming social value."

And "prurient interest" was defined as "a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond

Government certainly has no power to close down newspapers. Even censorship—whether for obscenity, for irresponsible reporting or editorials, or otherwise—is taboo. As Chief Justice Hughes said in *Near* v. *Minnesota*, 283 U. S. 697, decided in 1931:

> "[T]he administration of government has become more complex, the opportunities for malfeasance and corruption have multiplied, crime has grown to most serious proportions, and the danger of its protection by unfaithful officials and of the impairment of the fundamental security of life and property by criminal alliances and official neglect, emphasizes the primary need of a vigilant and courageous press, especially in great cities. The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct. Subsequent punishment for such abuses as may exist is the appropriate remedy, consistent with constitutional privilege." *Id.*, at 719–720.

I agree with that view.

It is said, however, that these issues are not before us as the case has been remanded to a single judge to pass on them. But we deal with plain error, as the state statute is unconstitutional on its face and we should put an end to lawless raids under it.[4]

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customary limits of candor in description or representation of such matters. If it appears from the character of the material or the circumstances of its dissemination that the subject matter is designed for a specially susceptible audience, the appeal of the subject matter shall be judged with reference to such audience." Tex. Penal Code, Art. 527, § 1 (Supp. 1970–1971).

[4] The appellee did not appeal from the decision of the District Court to remand the issue of harassment to a one-judge court, apparently since the ruling that the statute was unconstitutional

II

The constitutional mandate that government[5] "shall make no law . . . abridging the freedom of speech, or of the press" precludes in my view any form of censorship. Vicious, irresponsible, and depraved as the press often is, the constitutional remedy is not censorship.[6] The antidote is education, pinning our faith to the Jeffersonian creed that by education we may in time become a mature people.[7]

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made such further relief unnecessary, as all the harassment resulted from the enforcement of the statute. In this Court appellee has argued that his "constitutional rights [are] threatened by the existence of the Texas obscenity statute *and the overbearing means chosen to enforce it.*" He has raised the issue of harassment here and the documentary evidence in support of his claim is overwhelming.

[5] The First Amendment, originally applicable only to the Federal Government, was by virtue of the Fourteenth Amendment made applicable to the States in 1931 in *Stromberg* v. *California*, 283 U. S. 359.

[6] Thomas Jefferson wrote, "I deplore . . . the putrid state into which our newspapers have passed, and the malignity, the vulgarity, and mendacious spirit of those who write them. . . . It is however an evil for which there is no remedy, our liberty depends on the freedom of the press, and that cannot be limited without being lost." Jefferson, Democracy, selected and arranged by S. Padover 150–151 (1939).

[7] Mr. Justice Brandeis, concurring in *Whitney* v. *California*, 274 U. S. 357, 375–376, said:

"Those who won our independence . . . believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. . . . Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—

I have set forth my views over and over again as to why the First Amendment should be strictly construed; and they need not be repeated here. It is difficult—indeed impossible—to read the constitutional mandate that government "shall make no law" abridging freedom of the press to mean that government "may make some laws" abridging that freedom. Certainly a strict constructionist cannot so read it.

"The Court says it has been trying to balance the interests of society in protecting itself from the supposed evils of obscene material with the real interest in freedom of expression. There is ample evidence that the clear and definite language of the first amendment was intended to preclude the very problem of balancing assumed by the Court. The first amendment holds that the interest of society in freedom of expression [8] is more important than the harm that might flow from obscene material. The very interest in protection from injury from obscene material would be better served by allowing each individual to make a free appraisal of pornographic material. A hallmark of an immature and insecure society is the censorship of ideas. Censorship, which insulates all from what some suppose to be evil, merely magnifies that insecurity. If society does such a poor job of educating itself so that four letter words and explicit pictures are dangerous, the remedy is to improve the educational process, not

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the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed."

[8] We deal with a large and considerable problem. There are those who believe that an "ethic of sexuality joined with an ethic of the wholeness of life" (F. Darling, Wilderness and Plenty 75 (1970)) has a close relation not only to population control but to a reverence for both the land and animal life.

> to outlaw certain publications. While the first amendment does not mandate better education it does prohibit the censorship of ideas. This use of a balancing test evidences a misconception of the constitutional nature of society. There is nothing to balance. Society's security flows directly and solely from the freedom and security of each individual." 31 Albany L. Rev. 143, 151 (1967).

If I am correct in concluding that a State can make "no law" censoring the press because of obscenity, then a publisher threatened by such a law can go into a federal court to enjoin state officials from enforcing the law, as I made clear in my dissent in *Younger* v. *Harris*, *ante*, at 59. The special circumstances where such federal intervention is permissible are not restricted to bad faith on the part of state officials or the threat of multiple prosecutions. As Mr. Justice Butler, writing for the Court, said in *Terrace* v. *Thompson*, 263 U. S. 197, 214:

> "Equity jurisdiction will be exercised to enjoin the threatened enforcement of a state law which contravenes the Federal Constitution wherever it is essential in order effectually to protect property rights and the rights of persons against injuries otherwise irremediable; and in such a case a person, who as an officer of the State is clothed with the duty of enforcing its laws and who threatens and is about to commence proceedings, either civil or criminal, to enforce such a law against parties affected, may be enjoined from such action by a federal court of equity."

And see *Watson* v. *Buck*, 313 U. S. 387, 402.

No possible construction of this state law can save it. This is not a situation where mere overbreadth of a state statute may have chilling or crippling effects on First Amendment rights. This is a case where Texas has

entered a field which the Constitution bars all the States and the Federal Government from entering.

The Texas obscenity statute, as I view it, meets precisely the hypothetical statute we discussed in *Watson* v. *Buck*, 313 U. S. 387, 402.

> "It is of course conceivable that a statute might be flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph; and in whatever manner and against whomever an effort might be made to apply it."

No clearer case justifying federal intervention to prevent a state criminal trial can be imagined.

No pending prosecutions are sought to be enjoined, only future ones.[2] Such an injunction is not impermissible under 28 U. S. C. § 2283. See *Dombrowski* v. *Pfister*, 380 U. S. 479, 484 n. 2, and my dissent in *Younger* v. *Harris*, *ante*, at 65. Appellee also asked for declaratory relief. If *Zwickler* v. *Koota*, 389 U. S. 241, means anything, it means that such relief can also be granted.

III

If a publication deemed "obscene" is not under the umbrella of the First Amendment, then I do not see how it enjoys many constitutional safeguards. That which is out from under the First Amendment would normally be subject to the police power of the States. Yet the Constitution contains no standards or suggestions of standards respecting the vast array of subjects that various vocal groups would like to have suppressed—obscenity, sacrilege, un-Americanism, anti-clerical ideas, atheistic or anti-ecclesiastical ideas, Communism, racism,

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[2] The amended complaint asked for an injunction *only* against future arrests and prosecutions under the Texas statute, Art. 527, and a declaration that the statute was unconstitutional. See n. 3, *supra*.

and so on. Under the Constitution as written there are no standards of "good" or "bad" for the press. Since there is no constitutional definition of obscenity, the definition must be largely, if not exclusively, for legislative determination. Absent a controlling constitutional standard, I would think that a legislature could treat literature as it treats sewage effluent or infectious disease. That is not a happy prospect, for some would put even the Song of Solomon under the ban. It is, I fear, where we end once we lose our First Amendment moorings. Administrative censorship, however, is one thing. Criminal punishment is quite another. Publishing "obscene" literature cannot, as I view it, be made a crime under our constitutional standards.

"Whatever 'obscenity' is, it is immeasurable as a crime and delineable only as a sin. As a sin, it is present only in the minds of some and not in the minds of others. It is entirely too subjective for legal sanction. There are as many different definitions of obscenity as there are men; and they are as unique to the individual as are his dreams." Note, The Substantive Law of Obscenity: An Adventure in Quicksand, 13 N. Y. L. F. 81, 131 (1967).

What appeals to "prurient interests" describes sin to some but not to others and seems to me to be far too vague to pass muster as a criminal, as distinguished from an administrative, statute.[10]

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[10] This business of leveling the power of the Federal or State Government against a person in a criminal prosecution is an "awesome" power as MR. JUSTICE BLACK has stated:

"Experience, and wisdom flowing out of that experience, long ago led to the belief that agents of government should not be vested with power and discretion to define and punish as criminal past conduct which had not been clearly defined as a crime in advance." *Ginzburg* v. *United States*, 383 U. S. 463, 477 (dissenting opinion).

I see no help on the vagueness problem even if the test "utterly without redeeming social importance" were added to the criminal standard, as it was in *Jacobellis* v. *Ohio*, 378 U. S. 184, 191.[11] That is a measurement which again is wholly subjective. It cannot be related to anything but the judge's or jurors' sophistication or stage of cultural development. Nor do I think the problem is helped by introducing the concept of "contemporary community standards" whether that refers to the public at large or a local county or town standard. *Id.*, at 193.

The two tests—this Court's and that of Texas—seem to me to be substantially identical. I do not see how either can be held to be constitutional. The standard of guilt is wholly subjective. The jurors can convict or acquit according to their own personal tastes, their cultural standard, their literacy, and their tolerance for opposed ideas. And the same would be true of judges. It means that a book that is hailed as wholesome in one county may be the cause of punishment in another county of the same State.

The evidence in obscenity prosecutions is usually expert testimony. Analysts, English literature scholars, and others often have helpful and informed views, one way or the other. It seems impossible, if we continue to sanction the use of these vague standards in criminal prosecutions, that verdicts will be rendered which are based on the record and not on the emotional factors reflecting the prejudices of the judge or jurors.

Uncertainty, rather than certainty, is the standard. The book, play, poem, or movie is approved or condemned on the basis of the personal beliefs of the judge or jurors, not on the ban of a statute containing clear and objective standards.

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[11] See n. 3, *supra*.

The concept of "utterly without redeeming social importance" will divide even the experts. It is risky and perilous business to send men to prison on such provocative issues, which confuse people and create irreconcilable differences even among the judges who sentence them or approve their convictions.

In these criminal cases dealing with obscenity, we leave people confused and in the dark as to whether they are or are not criminals. Criminal laws must give fair warning; and a person receives no real warning when he crosses the line between the lawful and the unlawful, under the Texas statute [12] or under the standard approved by the Court.

Where constitutional rights may be infringed, *Winters* v. *New York*, 333 U. S. 507, should be our guide. There an "obscene" magazine was defined to include those which "massed" stories of bloodshed and lust to incite crimes. *Id.*, at 513. We held that standard to be too vague to satisfy constitutional standards.[13]

> "The standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement. The crime 'must be defined with appropriate definiteness.' . . . There must be ascertainable standards of guilt. Men of common intelligence cannot be required to guess at the meaning of the enactment.

[12] Even the police have no guidance as to the kind of books to be seized. See n. 1, *supra*.

[13] Even where First Amendment or other constitutional rights are not involved, no one may be required "to speculate as to the meaning of penal statutes." *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453. Chief Justice Marshall said in *United States* v. *Wiltberger*, 5 Wheat. 76, 105, that in determining the certainty needed in a penal law for its validity the "probability" that the legislature may have desired to include a species of activity within an Act is not enough. And see *United States* v. *Lacher*, 134 U. S. 624, 628; *Pierce* v. *United States*, 314 U. S. 306.

> The vagueness may be from uncertainty in regard to persons within the scope of the act, . . . or in regard to the applicable tests to ascertain guilt." *Id.*, at 515–516.

And see *Wright* v. *Georgia*, 373 U. S. 284, 292; *Smith* v. *California*, 361 U. S. 147, 151; *United States* v. *Harriss*, 347 U. S. 612; *Beauharnais* v. *Illinois*, 343 U. S. 250, 264; *Williams* v. *United States*, 341 U. S. 97; *Cantwell* v. *Connecticut*, 310 U. S. 296.

My view however is that any regime of censorship over literature whether expressed in a criminal statute [14] or an administrative [15] procedure is unconstitutional by reason of the command of the First Amendment.

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[14] See MR. JUSTICE BLACK's opinion in *Kingsley International Pictures Corp* v. *Regents*, 360 U. S. 684, 690 (concurring).

See my opinions in *Roth* v. *United States*, 354 U. S. 476, 508 (dissenting); *Smith* v. *California*, 361 U. S. 147, 167 (concurring); *Ginzburg* v. *United States*, 383 U. S. 463, 482 (dissenting).

[15] See MR. JUSTICE BLACK's separate opinion in *A Quantity of Books* v. *Kansas*, 378 U. S. 205, 213.